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DOD's National Security Personnel System: Provisions of Law and Implementation Plans

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DOD's National Security Personnel System: Provisions of Law and Implementation Plans

Summary

Title XI of the National Defense Authorization Act for FY2004, P.L. 108-136, includes provisions on a National Security Personnel System (NSPS) for the Department of Defense (DOD) and provisions on personnel management that are applicable government-wide. The law was enacted on November 24, 2003.

Title XI, Subtitle A, of the law authorizes the Secretary of Defense and the Director of the Office of Personnel Management (OPM) to establish a new human resources management (HRM) system for DOD's civilian employees and to jointly prescribe regulations for the system. The Secretary and the Director are authorized to establish and adjust a labor relations system and are required to provide a written description of the proposed personnel system or any adjustments to such system to the labor organizations representing DOD employees. A collaboration procedure must be followed by the Secretary, Director, and employee representatives. The Secretary is authorized to engage in any collaboration activities and collective bargaining at an organizational level above the level of exclusive recognition. The Secretary also is authorized to establish an appeals process that provides fair treatment for DOD employees covered by the NSPS. Regulations applicable to employee misconduct or performance that fails to meet expectations may not be prescribed until after the Secretary consults with the Merit Systems Protections Board (MSPB) and must afford due process protections and conform to public employment principles of merit and fitness at 5 U.S.C. §3201. A qualifying employee subject to some severe disciplinary actions may petition the MSPB for review of the department's decision. The board could dismiss any petition that does not raise a substantial question of fact or law and order corrective action only if the board finds that the department's personnel decision did not meet some prescribed standards. An employee adversely affected by a final decision or order of the board could obtain judicial review.

Subtitle C of Title XI includes amendments to the government-wide policies for the federal employee overtime pay cap, military leave, and Senior Executive Service pay, and creates a Human Capital Performance Fund to reward the highest-performing and most valuable employees in an agency.

Secretary of Defense Donald Rumsfeld named Navy Secretary Gordon England as the DOD official who is responsible for negotiating with labor organizations on the personnel reform effort. The most recent timetable for the new system, which was released by Secretary England on December 15, 2004, anticipates a phased implementation beginning around July 2005 with some 60,000 employees. Implementation of the labor relations component of the new system is anticipated by summer 2005. DOD and OPM jointly issued proposed regulations in the *Federal Register* on February 14, 2005. Many details have yet to be decided. The regulations state that issuances to implement the regulations will be prepared by DOD.

This report discusses each of the provisions in Title XI of P.L. 108-136 and plans to implement the law.

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DOD's National Security Personnel System: Provisions of Law and Implementation Plans

Introduction

In April 2003, the Department of Defense (DOD) sent a proposal entitled “The Defense Transformation for the 21st Century Act” to Congress.¹ Changes in the uniformed military personnel and acquisition systems were the principal focus of the proposal. However, it also recommended changes to the statutory bases for much of DOD's civilian personnel system, which covers some 700,000 civilian employees (about 26% of federal civilian executive branch personnel worldwide).²

On May 22, 2003, the House of Representatives passed H.R. 1588, the National Defense Authorization Act for FY2004, amended, by a 361 to 68 (Roll No. 221) vote.³ As reported to the House, H.R. 1588 included provisions at Subtitle A of Title XI related to government-wide personnel management. The bill also included provisions for a National Security Personnel System (NSPS) for DOD at Subtitle B. Many of the provisions had originated in DOD's April 2003 proposal and had been included in H.R. 1836, the Civil Service and National Security Personnel Improvement Act, reported to the House, amended (H.Rept. 108-116, part 1), by the Committee on Government Reform on May 19, 2003.⁴ The provisions were added to H.R. 1588 during Armed Services Committee markup.⁵ Several additional amendments were made to the personnel management provisions during House consideration and passage of H.R. 1588. The Senate version of the defense authorization bill, S. 1050, as passed by the Senate, amended, on May 22, 2003, on

¹ The text of the DOD proposal can be accessed at [<http://www.dod.gov/transformation/>], visited June 10, 2003.

² An April 1, 2004 letter to DOD employees by David Chu, Under Secretary of Defense for Personnel and Readiness, and Gordon England, Secretary of the Navy, refers to 700,000 civilian employees to be covered by the National Security Personnel System. Available on the Internet at [<http://www.cpms.osd.mil/nsps/>], visited Apr. 27, 2004.

³ H.R. 1588 was introduced by Representative Duncan Hunter, by request, on April 3, 2003, and was referred to the House Committee on Armed Services. The Committee marked up the bill on May 9 and May 14, 2003. H.R. 1588 was reported to the House, amended (H.Rept. 108-106) on May 16, 2003.

⁴ U.S. Congress, House Committee on Government Reform, *Civil Service and National Security Personnel Improvement Act*, report to accompany H.R. 1836, 108th Cong., 1st sess., H.Rept. 108-116, part 1 (Washington: GPO, 2003). Hereafter referred to as H.Rept. 108-116, part 1.

⁵ H.R. 1836 was introduced by Representative Tom Davis on April 29, 2003, and was referred to the House Committees on Armed Services, Government Reform, and Science. The Government Reform Committee marked up the bill on May 7, 2003.

a 98 to 1 (No. 194) vote, did not include these Title XI personnel management provisions (but included other personnel provisions at Title XI). On June 4, 2003, the Senate struck all after the enacting clause and substituted the text of S. 1050 in H.R. 1588. The Senate then passed H.R. 1588, amended, by voice vote the same day.⁶ H.R. 1588, as passed by the Senate, included, at Title XI, personnel provisions on pay authority for critical positions, the experimental personnel program for scientific and technical personnel, and personnel investigations that were not included in the House-passed version of the bill or S. 1166.

Senator Susan Collins, Chairman of the Senate Committee on Governmental Affairs, introduced S. 1166, the National Security Personnel System Act, on June 2, 2003, and it was referred to the Senate Governmental Affairs Committee. On June 4, 2003, the committee conducted a hearing on the bill. Following the hearing, Senators Voinovich and Thomas Carper asked the Comptroller General, David Walker, to respond to several additional questions. His response, submitted on July 3, 2003, included the following comments.

[I]t is critical that agencies or components have in place the human capital infrastructure and safeguards before implementing new human capital reforms. This institutional infrastructure includes, at a minimum (1) a human capital planning process that integrates the agency's human capital policies, strategies, and programs with its program mission, goals, and desired outcomes, (2) the capabilities to develop and implement a new human capital system effectively, and (3) a modern, effective, credible and, as appropriate, validated performance appraisal and management system that includes adequate safeguards, such as reasonable transparency and appropriate accountability mechanisms, to ensure the fair, effective, and nondiscriminatory implementation of the system.

Although we do not believe that DOD should wait for the full implementation of the new human capital system at the Department of Homeland Security (DHS), ... we do think that there are important lessons that can be learned from how DHS is developing its new personnel system. For example, DHS has implemented an approach that includes a design team of employees from DHS, the Office of Personnel Management (OPM), and major labor unions. To further involve employees, DHS has conducted a series of town hall meetings around the country and held focus groups to further learn of employees' views and comments ... DOD ... needs to ensure that employees are involved in order to obtain their ideas and gain adequate "buy-in" for any related transformational efforts.

[W]e suggest that DOD also be required to link its performance management system to program and performance goals and desired outcomes.... [This] helps the organization ensure that its efforts are properly aligned and reinforces the line of sight between individual performance and organizational success so that an individual can see how her/his daily responsibilities contribute to results and outcomes.

In our view, it would be preferable to employ a governmentwide approach to address certain flexibilities that have broad-based application and serious

⁶ S. 1050 was introduced by Senator John Warner and reported to the Senate (S.Rept. 108-46) by the Committee on Armed Services on May 13, 2003. Earlier, on May 7 and 8, 2003, the Armed Services Committee marked up the bill.

potential implications for the civil service system broad banding, pay for performance, reemployment, and pension offset waivers. In these situations, it may be prudent and preferable for Congress to provide such authorities on a governmentwide basis and in a manner that assures that a sufficient personnel infrastructure and appropriate safeguards are in place before an agency implements the new authorities.

Based on our experience, while DOD's leadership has the intent and the ability to transform the department, the needed institutional infrastructure is not in place in a vast majority of DOD organizations.... In the absence of the right institutional infrastructure, granting additional human capital authorities will provide little advantage and could actually end up doing damage if the authorities are not implemented properly by the respective department or agency.⁷

The Senate Governmental Affairs Committee marked up the bill on June 17, 2003, and, on the same day, ordered S. 1166 to be reported to the Senate, amended, on a 10 to 1 roll call vote. During the mark-up, the committee agreed to an amendment offered by Senator Joseph Lieberman to clarify the intent of the bill's provisions on collective bargaining and an amendment offered by Senator George Voinovich to exclude 10 DOD laboratories from the NSPS. Both amendments were agreed to by voice vote. On September 5, 2003, the committee reported S. 1166 to the Senate with amendments and without a written report.

Senator Collins, a conferee on the conference committee for H.R. 1588, along with Senators Voinovich and Carl Levin (an H.R. 1588 conferee), among others, expressed the hope that the provisions of S. 1166, as amended, would be seriously considered by the conference as an alternative to the provisions in H.R. 1588 on the NSPS. On July 14, 2003, Senators Collins, Voinovich, Stevens, and Sununu wrote a letter to their Senate colleagues expressing their support for, and sharing their views on, the personnel provisions of S. 1166. They stated that, "[a]s a template for future governmentwide civilian personnel reform, the personnel provisions in the defense bill must strike the right balance between promoting a flexible system and protecting the rights of our constituents who serve in the federal civil service" and that "[w]e believe that our proposal strikes such a balance."⁸ Several provisions that were the same or similar to S. 1166 were added to H.R. 1588 in conference.

On November 7, 2003, the House agreed to the conference report (H.Rept. 108-354) accompanying H.R. 1588 on a 362-40, 2 present (Roll No. 617) vote. The Senate agreed to the conference report on a 95-3 (No. 447) vote on November 12, 2003. President Bush signed H.R. 1588 into law on November 24, 2003, as P.L. 108-136 (117 Stat. 1392).

⁷ U.S. General Accounting Office, *Posthearing Questions Related to Proposed Department of Defense (DOD) Human Capital Reform*, GAO-03-965R (Washington: July 3, 2003).

⁸ Letter from Senators Susan Collins, George Voinovich, Ted Stevens, and John Sununu to Senate colleagues, July 14, 2003. Provided to CRS by the Senate Committee on Governmental Affairs by facsimile.

This report discusses each of the provisions in Title XI of P.L. 108-136 and plans to implement the law.⁹ For discussion of the background to the provisions and side-by-side comparisons of the provisions with current law, see CRS Report RL31805, *Authorization and Appropriations for FY2004: Defense*, by Amy Belasco and Stephen Daggett; CRS General Distribution Memorandum, *Department of Defense Transformation Proposal (Title I, Subtitle A, Section 101) and H.R. 1588 Conference Report (Title XI, Subtitles A,B,C): A Side-by-Side Comparison*, coordinated by Barbara L. Schwemle; CRS Report RL31924, *Civil Service Reform — H.R. 1836, Homeland Security Act, and Current Law*, by Barbara L. Schwemle and Thomas J. Nicola; and CRS Report RL31916, *Defense Department Original Transformation Proposal: Compared to Existing Law*, by Robert L. Goldich, Gary J. Pagliano, Barbara L. Schwemle, and Thomas J. Nicola.

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Implementation of Title XI of P.L. 108-136

Discussions on implementation of the NSPS began in January 2004.¹⁰ Initially, DOD planned to publish details of the new system by April 2004, and cover 300,000 civilian DOD employees under the NSPS by October 1, 2004. In early February 2004, Secretary of Defense Donald Rumsfeld named Navy Secretary Gordon England as the DOD official responsible for negotiating with labor organizations on the personnel reform effort.¹¹ On April 14, 2004, Secretary England announced that implementation of the NSPS would be phased in over several years so that all employees would be covered by the NSPS by October 1, 2006. More specific implementation steps and a revised timetable were announced by Secretary England on December 15, 2004, as follows.¹² Civilian DOD employees being converted to

⁹ Sections 1111 (automated personnel management program), 1112 (demonstration project relating to certain acquisition personnel management), 1114 (restoration of annual leave to certain DOD employees affected by base closings), and 1115 (employment of certain civilian faculty members at a Defense institution) of Title XI, Subtitle B, of P.L. 108-136 are beyond the purview of this report.

¹⁰ Tim Kauffman, "Union-busting, DOD Style: Work-force Plan Would Slash Unions' Membership, Influence," *Federal Times*, Feb. 16, 2004. Available on the Internet at [<http://www.federaltimes.com/>], visited Apr. 27, 2004.

¹¹ The National Security Personnel System Program Executive Office was established in April 2004, and Secretary England announced on May 24, 2004, that Mary E. Lacey, a member of the Senior Executive Service, would serve as the program executive officer. Earlier, on February 13, 2004, OPM Director Kay Coles James named George Nesterchuk as a senior advisor and announced that he would serve as the lead OPM official on design of the NSPS.

¹² U.S. Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), *DOD Selects First Group for National Security Personnel System*, News Release No. 1286-04, Dec. 15, 2004. Available on the Internet at [<http://www.cpms.osd.mil/nsps/>], (continued...)

the NSPS will be grouped into three “spirals.” Some 300,000 General Schedule employees from the Army, Navy, Marine Corps, Air Force, Office of the Secretary of Defense, and other DOD offices who are based in the United States will comprise Spiral One.¹³ Spiral Two will consist of all remaining eligible employees and Spiral Three will cover employees of the DOD laboratories if current legislative restrictions covering laboratory employees are eliminated. The new system will be implemented in phases. Spiral One will be implemented in three phases over 18 months and will begin around July 2005 by covering some 60,000 employees. The second spiral will begin after the department has assessed Spiral One and after the Secretary of Defense certifies DOD’s performance management system.

Full implementation of the new system is anticipated anywhere from July 2007 through January 2008. Implementation of the labor relations component of the new system is anticipated by summer 2005. Proposed regulations to implement the system were jointly published in the *Federal Register* by DOD and OPM on February 14, 2005.¹⁴ Comments on the regulations must be received by March 16, 2005. DOD and OPM conducted a joint briefing on the proposed regulations on February 10, 2005.¹⁵ The proposed regulations generally express concepts for the new system rather than details about how it will operate. The regulations state that issuances to implement the regulations will be prepared by DOD.

The process for designing the new personnel system involved Program Executive Office working groups, which began a nearly two-month process to develop and evaluate options for the NSPS in late July 2004. Focus groups and town hall meetings and discussions with union leaders were employed by the working groups to gather input from employees and stakeholders.¹⁶ Other specific implementation steps are noted below under relevant sections of the law. DOD has established a website to monitor implementation of the NSPS.¹⁷

Prior to the enactment of the provisions authorizing the Department of Defense to create a new human resources management system, DOD civilians were covered

¹² (...continued)
visited Jan. 24, 2005.

¹³ U.S. Army, Navy, Marine Corps, Air Force and other DOD civilians participating in Spiral One are listed on the Internet at [<http://www.cpms.osd.mil/nsps>], visited Jan. 24, 2005.

¹⁴ U.S. Department of Defense and U.S. Office of Personnel Management, “National Security Personnel System,” *Federal Register*, vol. 70, no. 29, Feb. 14, 2005, pp. 7551-7603.

¹⁵ The transcript of the joint briefing is available on the Internet at [<http://www.dod.gov/transcripts/2005>], visited Feb. 14, 2005.

¹⁶ According to DOD, 106 focus groups were held throughout the department and included employees overseas. The groups generated more than 10,000 comments, ideas, and suggestions. Town hall meetings conducted by the Departments of the Army, Navy, and the Air Force, and the Defense agencies are listed on the Internet at [<http://www.cpms.osd.mil/nsps/>], visited Jan. 24, 2005.

¹⁷ See [<http://www.cpms.osd.mil/nsps/>], visited Jan. 24, 2005.

by the personnel laws codified in Title 5 *United States Code* on government organization and employees. Under the authority granted by Title XI of P.L. 108-136, some 700,000 civilian employees are expected to be covered by the new National Security Personnel System. The NSPS policies (especially in the areas of pay, performance management, adverse actions and appeals, and labor management relations) are more flexible than those under Title 5. During debate prior to the enactment of P.L. 108-136 and in discussions that have continued since, several Members of Congress stated that implementation of the NSPS (along with the Department of Homeland Security's new HRM system currently being created) should be monitored as a possible model for amending Title 5 and extending those provisions to the rest of the federal government's civilian workforce.

Reflecting the importance of carefully crafting the NSPS, Senators Susan Collins, Carl Levin, Ted Stevens, John Sununu, and George Voinovich reportedly sent a letter to Secretary England on March 3, 2004, which stated that:

[t]he involvement of the civilian work force in the design of the new National Security Personnel System is critical to its ultimate acceptance and successful implementation. Full collaboration with the Office of Personnel Management and the federal employee unions will assist the department in meeting this critical challenge.¹⁸

A March 12, 2004, letter sent by Senator Daniel Akaka to Secretary of Defense Donald Rumsfeld urged DOD to issue all proposals on the NSPS in the *Federal Register* and not as internal regulations, for reasons of "openness, transparency, public comment, and scrutiny of the details."¹⁹ Senator Edward Kennedy, in a December 10, 2004, press release, also emphasized development of the new system "in the most transparent way possible." According to the Senator:

Congress gave the Department of Defense the authority to make major personnel changes affecting 700,000 defense employees, but only with the understanding that those changes would be made in consultation with representatives of the employees. It's appalling that the Bush Administration is ignoring that understanding by stonewalling the representatives and refusing to let them review personnel changes before they are published....²⁰

Government Executive reported that Senator Kennedy wrote to Defense Secretary Donald Rumsfeld and OPM Director Kay Coles James on November 19, 2004, to voice opposition to their refusal to share the details of the new personnel

¹⁸ Tim Kauffman, "DOD Personnel Plan Under Fire From Lawmakers, Unions," *Federal Times*, Mar. 8, 2004. Available on the Internet at [<http://www.federaltimes.com/>], visited Apr. 27, 2004.

¹⁹ Senator Daniel Akaka, Press Release, "Akaka Queries Agencies on Personnel System Changes," Mar. 23, 2004. Available on the Internet at [<http://akaka.senate.gov/>], visited Apr. 27, 2004.

²⁰ Senator Edward M. Kennedy, Press Release, "Senator Edward M. Kennedy Statement on Response By Bush Administration on Transparency in National Security Personnel Regulations," Dec. 10, 2004. Available on the Internet at [<http://kenedy.senate.gov/>], visited Jan. 24, 2005.

system with officials of the unions representing DOD employees in advance of the publication of the regulations in the *Federal Register*. Reportedly, DOD believes that do to so would “depart from the intent of the Administrative Procedures Act.”²¹

In a press release issued on February 10, 2005, Senator Lieberman expressed his deep disappointment with the personnel rules, stating: “The proposal imposes excessive limits on collective bargaining ... changes the appeals process to interfere with employees’ rights to due process ... and ... contains unduly vague and untested pay and performance provisions.”²²

Department of Defense National Security Personnel System — Title XI, Subtitle A, of P.L. 108-136

P.L. 108-136 provides the following.²³ Section 1101(a)(1) of P.L. 108-136 amends Part III, Subpart I, of Title 5 *United States Code* by adding a new Chapter 99 entitled Department of Defense (DOD) National Security Personnel System. The new system covers some 700,000 DOD civilian employees.

Section 9901. Definitions²⁴

This section defines terms for the new chapter. “Director” means the Director of the Office of Personnel Management (OPM) and “Secretary” means the Secretary of Defense.

Section 9902. Establishment of Human Resources Management System²⁵

In General. The new Section 9902(a) of P.L. 108-136 provides that notwithstanding any other provision of Part III, the Secretary of Defense may, in regulations prescribed jointly with the OPM Director, establish, and from time to time adjust, a human resources management (HRM) system, referred to as the

²¹ David McGlinchey, “Legislator Says Withholding Pentagon Personnel Plans Violates Laws,” *Government Executive*, Nov. 29, 2004, and David McGlinchey, “Back and Forth,” *Government Executive*, Dec. 16, 2004. Both are available on the Internet at [<http://www.govexec.com>], visited Jan. 24, 2005.

²² “Lieberman Condemns Proposed DOD Personnel Rules,” Press Release, Feb. 10, 2005. Available on the Internet at [<http://hsgac.senate.gov/index.cfm>], visited Feb. 14, 2005.

²³ 117 Stat. 1621-1633. U.S. Congress, Conference Committees, 2003, *National Defense Authorization Act for Fiscal Year 2004*, conference report to accompany H.R. 1588, 108th Cong., 1st sess., H.Rept. 108-354 (Washington: GPO, 2003), pp. 162-163, 171-173, 232-256, 733, and 758-764.

²⁴ 117 Stat. 1621.

²⁵ 117 Stat. 1621-1631.

National Security Personnel System (NSPS), for some or all of the organizational or functional units of DOD.

Requirements for the HRM System. The HRM system must be flexible and contemporary. The new Section 9902(b) provides that it could not waive, modify, or otherwise affect:

- the public employment principles of merit and fitness at 5 U.S.C. §2301, including the principles of hiring based on merit, fair treatment without regard to political affiliation or other non-merit considerations, equal pay for equal work, and protection of employees against reprisal for whistleblowing;
- any provision of 5 U.S.C. §2302, relating to prohibited personnel practices;
- any provision of law referred to in 5 U.S.C. §2302(b)(1)(8)(9); or any provision of law implementing any provision of law referred to in 5 U.S.C. §2302(b)(1)(8)(9) by providing for equal employment opportunity through affirmative action; or providing any right or remedy available to any employee or applicant for employment in the public service.

Various subparts and chapters of Part III of Title 5 *United States Code* which cannot be waived, modified, or otherwise affected in the new HRM system are listed at the new Section 9902(d) as follows:

Subpart A — General Provisions, including Chapter 21 Definitions; Chapter 23 Merit System Principles; Chapter 29 Commissions, Oaths, Records, and Reports;

Subpart B — Employment and Retention, including Chapter 31 Authority for Employment; Chapter 33 Examination, Selection, and Placement; Chapter 34 Part-time Career Employment Opportunities; Chapter 35 Retention Preference (RIF), Restoration, and Reemployment;

Subpart E — Attendance and Leave, including Chapter 61 Hours of Work; Chapter 63 Leave;

Subpart G — Insurance and Annuities, including Chapter 81 Compensation for Work Injuries; Chapters 83 and 84 Retirement; Chapter 85 Unemployment Compensation; Chapter 87 Life Insurance; Chapter 89 Health Insurance; Chapter 90 Long Term Care Insurance;

Subpart H — Access to Criminal History Record Information, including Chapter 91 for individuals under investigation;

Chapter 41 — Training;

Chapter 45 — Incentive Awards;

Chapter 47 — Personnel Research Programs and Demonstration Projects;

Chapter 55 — Pay Administration, including biweekly and monthly pay periods and computation of pay, advanced pay, and withholding of taxes from pay, except that Subchapter V of Chapter 55 on premium pay (overtime, night, Sunday pay), apart from section 5545b, may be waived or modified;

Chapter 57 — Travel, Transportation, and Subsistence;

Chapter 59 — Allowances, which includes uniforms, quarters, overseas differentials;

Chapter 71 — Labor Management and Employee Relations [H.R. 1588, as passed by the House, did not include this provision];

Chapter 72 — Antidiscrimination, Right to Petition Congress, including minority recruitment, antidiscrimination on the basis of marital status and handicapping condition, furnishing information to Congress;

Chapter 73 — Suitability, Security, and Conduct, including security clearance, political activities (Hatch Act), misconduct (gifts, drugs, alcohol);

Chapter 79 — Services to Employees, including safety program, protective clothing and equipment; or

any rule or regulation prescribed under any provision of law referred to in any of the statements in bullets immediately above.

Other requirements for the HRM system include that it must:

- ensure that employees may organize, bargain collectively as provided for in the proposed Chapter 99, and participate through labor organizations of their own choosing in decisions that affect them, subject to the provisions of the proposed Chapter 99 and any exclusion from coverage or limitation on negotiability established pursuant to law;
- not be limited by any specific law or authority under Title 5, or by any rule or regulation prescribed under Title 5, that is waived in regulations prescribed under the proposed Chapter 99, subject to the requirements stated above; and
- include a performance management system. Such a system must incorporate these elements: adherence to the merit principles of 5 U.S.C. §2301; a fair, credible, and transparent employee performance appraisal system; a link between the performance management system and the agency's strategic plan; and a means for ensuring employee involvement in the design and implementation

of the system. Other elements the system must incorporate are: adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system; a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review; effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and a pay-for-performance evaluation system to better link individual pay to performance, and provide an equitable method for appraising and compensating employees.

Personnel Management at Defense Laboratories. The NSPS will not apply with respect to the laboratories listed below before October 1, 2008. It will apply on or after October 1, 2008, only to the extent that the Secretary determines that the flexibilities provided by the NSPS are greater than the flexibilities provided to those laboratories pursuant to section 342 of the National Defense Authorization Act for Fiscal Year 1995 (P.L.103-337) and section 1101 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (5 U.S.C. §3104 note) respectively. The laboratories covered by this provision (5 U.S.C. §9902(c)) are the Aviation and Missile Research Development and Engineering Center; the Army Research Laboratory; the Medical Research and Materiel Command; the Engineer Research and Development Command; the Communications-Electronics Command; the Soldier and Biological Chemical Command; the Naval Sea Systems Command Centers; the Naval Research Laboratory; the Office of Naval Research; and the Air Force Research Laboratory. (Senator Voinovich offered a similar provision as an amendment that was agreed to by voice vote by the Senate Governmental Affairs Committee during mark-up of S. 1166. According to Senator Voinovich's office, the amendment continued the authority of the reinvention laboratories to use various personnel flexibilities that DOD has found to be successful. The NSPS provisions might reduce these personnel flexibilities at the laboratories if they were to be included in NSPS said his office. In an article on the Governmental Affairs Committee mark-up, *The Washington Post* quoted a DOD official who said that the provision "while designed to protect existing flexibilities at the labs, would prevent the Pentagon from increasing those flexibilities."²⁶

Limitations Relating to Pay. Nothing in Section 9902 constitutes authority to modify the pay of any employee who serves in an Executive Schedule position. Except for this provision, the total amount of allowances, differentials, bonuses, awards, or other similar cash payments paid under Title 5 in a calendar year to any employee who is paid under 5 U.S.C. §5376 (senior-level pay) or 5383 (Senior Executive Service pay) or under Title 10 or other comparable pay authority

²⁶ Stephen Barr, "Senate Committee Backs Plan for Overhaul of Pentagon Pay, Rules," *The Washington Post*, June 18, 2003, p. B2.

established for DOD senior executives or equivalent employees may not exceed the total annual compensation payable to the Vice President (\$208,100).

The law provides that to the maximum extent practicable, the rates of compensation for civilian DOD employees would be adjusted at the same rate, and in the same proportion, as are rates of compensation for members of the uniformed services.

To the maximum extent practicable, for FY2004 through FY2008, the overall amount allocated for compensation of the civilian employees of an organizational or functional unit of DOD that is included in the NSPS may not be less than the amount of civilian pay that would have been allocated for compensation of such employees for such fiscal year if they had not been converted to the NSPS. The amount will be based on, at a minimum, the number and mix of employees in such organizational or functional unit prior to the conversion of such employees to the NSPS; and adjusted for normal step increases and rates of promotion that would have been expected had such employees remained in their previous pay schedule. (S. 1166 included a similar provision.)

To the maximum extent practicable, the regulations implementing the NSPS will provide a formula for calculating the overall amount to be allocated for fiscal years after FY2008 for compensation of the civilian employees of an organizational or functional unit of DOD that is included in the NSPS. The formula will ensure that in the aggregate, employees are not disadvantaged in terms of the overall amount of pay available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization, changes in the mix of employees performing those functions, and other changed circumstances that might impact pay levels. (S. 1166 included a similar provision.)

The Executive Schedule is the pay system for the heads of federal departments and agencies. As of January 2005, pay for the five levels of the Executive Schedule ranges from \$131,400 to \$180,100. This provision appears to authorize pay, for individual employees, which could exceed that of the department or agency heads. Under current law, OPM is required to certify that an agency has an acceptable performance management system in place before salaries for these employees could range up to the Vice President's salary. Since the proposals would not amend 5 U.S.C. §5307, it remains to be determined if OPM certification of the DOD policy will be required.

Under the new Section 9902(d) in P.L. 108-136, DOD is authorized to make changes in Title 5 Chapters 43 (Performance Appraisal) and 53 (Pay Rates and Systems) in establishing the new HRM system. The law does not provide any further detail on the design and operation of that new pay system.

Implementation of the Law. Several key chapters of Part III of Title 5 *United States Code* may be waived, modified, or otherwise affected as the new HRM system is developed. These are:

- Chapter 43 — Performance Appraisal
- Chapter 51 — Position Classification

- Chapter 53 — Pay Rates and Systems
- Chapter 71 — Labor Management and Employee Relations
- Chapter 75 — Adverse Actions
- Chapter 77 — Appeals²⁷

During testimony before the House Subcommittee on Civil Service and Agency Organization at its April 29, 2003 hearing on the proposed NSPS of the Defense Transformation for the 21st Century Act, David Chu discussed DOD's Best Practices Initiative. He referred Members of Congress to an April 2, 2003, *Federal Register* notice for additional details on the types of HRM flexibilities the department is implementing at its science and technology reinvention laboratories.²⁸

A September 3, 2004, paper by the Program Executive Office working groups listed (without details) "Potential Options for the National Security Personnel System Human Resource Management System." Among the design options identified were those establishing a pay banding system with broad salary ranges and simplified criteria and procedures for assigning positions to the bands; developing a market-sensitive pay system; streamlining and consolidating appointing authorities to simplify the hiring of external candidates; developing a pay-for-performance system allowing for progression through a pay band based on performance and/or contribution; allowing base pay increases for reassignments; and streamlining the Performance Improvement Plan process.²⁹

As stated above, the proposed regulations to implement the NSPS were published in the *Federal Register* on February 14, 2005. Provisions on Classification (Subpart B), Pay and Pay Administration (Subpart C), Performance Management (Subpart D), Staffing and Employment (Subpart E) and Workforce Shaping (Subpart F) are included in the regulations. Many details have yet to be decided, but the general provisions in each of these areas are highlighted below.

- *Classification.* The classification structure and rules in 5 U.S.C. Chapter 51 and the job grading system in 5 U.S.C. Chapter 53, Subchapter IV, will be replaced by a system that will provide equal pay for work of equal value, appropriately consider both national and local pay rates for private sector workers, and provide appropriate incentives and recognition for excellent performance. To classify positions, DOD may establish career groups based on such factors as mission or function, nature of work, qualifications or

²⁷ The Chapters 71, 75, and 77 changes are discussed below.

²⁸ Statement of David S. C. Chu, Under Secretary of Defense for Personnel and Readiness, April 29, 2003, p. 5 (unpublished). The best practices were published at U.S. Department of Defense, "Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Project; Notice of Amendment of Demonstration Project Plans," *Federal Register*, vol. 68, April 2, 2003, pp. 16119-16142. Information on these flexibilities appeared in earlier versions of this CRS report and is available from the author.

²⁹ U.S. Department of Defense, NSPS, "Potential Options for the National Security Personnel System Human Resource Management System," Sept. 3, 2004. Available on the Internet at [<http://www.cpms.osd.mil/nsps>], visited Jan. 24, 2005.

competencies, career or pay progression patterns, relevant labor-market features, and other characteristics of the occupations or positions. Issuances to implement the regulations will document the criteria and rationale for grouping occupations or positions into career groups. One or more pay schedules may be established within each career group. Each pay schedule may include two or more pay bands. The implementing issuances will document definitions of the pay bands specifying type and range of difficulty and responsibility, qualifications or competencies, or other characteristics of the work.

- *Pay and Pay Administration.* The pay structures and pay administration rules established under 5 U.S.C. Chapter 53 and 5 U.S.C. Chapter 55, Subchapter V, will be replaced by a system that will link pay with performance and promote a high-performance culture in DOD. Issuances to implement the regulations will establish a pay system which will include, among other features, rate ranges linked to pay bands for each career group and aligned with the classification structure; policies to set and adjust band rate ranges; policies to set and adjust local market supplements; and pay based on performance. Limitations on maximum amounts of basic and aggregate pay will be established by the Secretary of Defense. Ranges of basic pay, including minimum and maximum rates, for pay bands may be established. A common rate range applicable in all locations will be established for each pay band within a career group. Mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other federal agencies, and any other relevant factors may be considered in determining rate ranges. Local market supplements, applicable in specified local market areas, may be established as a supplement to basic pay. The factors identified above and, in addition, allowances and differentials under 5 U.S.C. Chapter 59 will be considered in setting and adjusting the supplements. A performance rating above “unacceptable” will be required to receive a basic pay increase and local market supplement. Individual, team, or organizational performance also will be rewarded with performance pay increases and bonuses allocated through pay pools. Payouts will be determined by the amount of money in the pay pool and the number of shares assigned to individuals. Implementing issuances will establish the pay pools and govern how they will be managed.
- *Performance Management.* Issuances to implement the regulations will establish a performance management system. Among other requirements, the system must adhere to the merit principles; be fair, credible, and transparent; be linked with DOD’s strategic plan; ensure that employees are involved in the system’s design and implementation; provide adequate training and retraining for managers and supervisors; ensure ongoing feedback and dialogue on performance; and ensure that agency resources for the system are adequate. Employee performance will be periodically appraised, generally once a year, against expectations. The system will

distinguish between employees based on performance and contribution. The performance of supervisors and managers will be assessed and measured on how well they plan, monitor, develop, correct, and assess the performance of their subordinate employees. Implementing issuances will establish a rating system with multiple levels. An individual's performance rating and the number of shares assigned to him or her will be communicated to the employee prior to a performance payout.

- *Staffing and Employment.* The proposed regulations address policies and procedures for various staffing issues. The merit principles, prohibited personnel practices, and veterans' preference will apply. Probationary periods for employees appointed to competitive and excepted service positions may be established by the Secretary of Defense. DOD may continue to use qualification standards established or approved by OPM and also may establish qualification standards for NSPS positions. Implementing issuances may be prescribed on assignment, reassignment, reinstatement, detail, transfer, and promotion.
- *Workforce Shaping.* Policies for realigning, reorganizing, and reshaping the DOD workforce are prescribed in the proposed regulations. The policies will apply to reductions in force (RIFs), transfer of functions, and furloughs. An employee's retention standing in a RIF will be determined by tenure, veterans' preference, performance rating, and creditable civilian and/or uniformed service. An employee separated by RIF, reduced in band by RIF, or furloughed by RIF for more than 30 consecutive days may appeal the RIF action to the Merit Systems Protection Board.

Provisions to Ensure Collaboration With Employee Representatives on National Security Personnel System. P.L. 108-136 adds a new section, 5 U.S.C. §9902(f), that requires the Secretary of Defense and the Director of OPM to provide a written description of the proposed personnel system or adjustments to such system to the labor organizations representing employees in the department. The measure uses the term "employee representatives" to describe these organizations. The employee representatives are given at least 30 calendar days to review and make recommendations with respect to the proposal, unless extraordinary circumstances require earlier action. Such recommendations must be given full and fair consideration by the Secretary and the Director. Section 9902(f)(B)(i) requires the Secretary and the Director to notify Congress of those parts of the proposal for which recommendations were made, but not accepted.

Section 9902(f)(B)(ii) requires the Secretary and the Director to meet and confer with the employee representatives for not less than 30 calendar days to attempt to reach agreement on whether and how to proceed with those parts of the proposal for which recommendations were made, but not accepted. At the Secretary's option, or if requested by a majority of the employee representatives participating, the Federal Mediation and Conciliation Service may assist with the discussions. After 30 calendar days following notification and consultation, the Secretary may implement

any or all of the disputed parts of the proposal if it is determined that further consultation and mediation are unlikely to produce agreement. However, such implementation may occur only after 30 days following notice to Congress of the decision to implement the part or parts involved. Implementation may occur immediately for those parts of the proposal that did not generate recommendations from the employee representatives, and where the Secretary and the Director accepted the recommendations of the employee representatives. The Secretary may, at his discretion, engage in any and all of the collaboration activities at an organizational level above the level of exclusive recognition.

If a proposal is implemented, the Secretary and the Director must develop a method for employee representatives to participate in any further planning or development which might become necessary. In addition, employee representatives must be given adequate access to information to make participation productive.

Provisions Regarding National Level Bargaining. A new section, 5 U.S.C. §9902(g)(1), allows any personnel system implemented or modified under Section 9902(f) to include employees from any bargaining unit with respect to which a labor organization has been accorded exclusive recognition. (A labor organization is described generally as having been accorded “exclusive recognition” when an election has occurred (with the labor organization receiving support from a majority of employees) and the results have been certified by the Federal Labor Relations Authority (“FLRA”).) For any of these bargaining units, the Secretary is permitted to bargain at an organizational level above the level of exclusive recognition. The decision to bargain at a level above the level of exclusive recognition is not subject to review or to dispute resolution procedures outside the department.

Any bargaining conducted at a level above the level of exclusive recognition is binding on all subordinate bargaining units and on the department and its subcomponents; supersedes all other collective bargaining agreements, except as otherwise determined by the Secretary; is not subject to further negotiations for any purpose, except as provided for by the Secretary; and is subject to review by an independent third party only to the extent permitted by the act.

Because organizational bargaining would likely focus on the larger issues affecting all employees, other topics may not be considered, including concerns that are significant only to a particular bargaining unit. Proponents of organizational bargaining, however, contend that such bargaining is more expeditious.

Provisions to Ensure Collaboration With Employee Representatives on Development of Labor Relations System. Section 9902(d)(2) prevents the new personnel system from waiving the application of Chapter 71 of the *United States Code*. Chapter 71 sets forth the labor-management relations structure for the federal government. At the same time, however, Section 9902(m)(1) states: “Notwithstanding section 9902(d)(2), the Secretary, together with the Director, may establish and from time to time adjust a labor relations system for the Department of Defense to address the unique role that the Department’s civilian workforce plays in supporting the Department’s national security mission.”

To ensure that there is collaboration between the Secretary, the Director, and employee representatives, the Secretary is required to implement a process similar to the one defined for the creation of the NSPS. The Secretary and the Director are required to give employee representatives and management the opportunity to have meaningful discussions concerning the development of the new system. Representatives must be given at least 30 calendar days to review the proposal for the system and make recommendations with respect to the proposal, unless extraordinary circumstances require earlier action. Recommendations must be given full and fair consideration.

Section 9902(m)(3)(B)(i) requires the Secretary and the Director to meet and confer with the employee representatives for not less than 30 calendar days to attempt to reach agreement on whether and how to proceed with those parts of the proposal for which recommendations were made, but not accepted. At the Secretary's option, or if requested by a majority of the employee representatives participating, the Federal Mediation and Conciliation Service may assist with the discussions. After 30 calendar days following consultation and mediation, the Secretary may implement any or all of the disputed parts of the proposal if it is determined that further consultation and mediation is unlikely to produce agreement. However, such implementation may occur only after 30 days following notice to Congress of the decision to implement the part or parts involved. Implementation may occur immediately for those parts of the proposal that do not generate recommendations from the employee representatives, and where the Secretary and the Director have accepted the recommendations of the employee representatives.

The process for collaboration with the employee representatives must begin no later than 60 calendar days after the date of enactment. Section 9902(m)(4) authorizes the Secretary to engage in any and all of the collaboration activities at an organizational level above the level of exclusive recognition.

The labor relations system developed or adjusted under Section 9902(m) must provide for the independent third party review of decisions and for determining which decisions could be reviewed, who would conduct the review, and the standards to be used during the review. Unless extended or otherwise provided for in law, the authority to establish, implement, and adjust the labor relations system expires six years after the date of enactment. At that time, the provisions of chapter 71 will apply.

Implementation. Subpart I of the proposed regulations define the department's labor-relations system. Section 9901.901 of the proposed regulations indicates that the system "addresses the unique role that the Department's civilian workforce plays in supporting the Department's national security mission."

The proposed regulations provide for the creation of a National Security Labor Relations Board that would do the following: conduct hearings and resolve complaints of unfair labor practices; resolve issues relating to the scope of bargaining and the duty to bargain in good faith; resolve disputes concerning requests for information; resolve exceptions to arbitration awards; resolve negotiation impasses,

and conduct de novo reviews on all matters within the Board's jurisdiction.³⁰ Under the regulations, the Board could also issue binding department-wide opinions for matters within its jurisdiction upon request of a department component or a labor organization.³¹ Many of these duties are currently performed by the FLRA pursuant to 5 U.S.C. § 7105. Here, however, the regulations would provide the FLRA with only the authority to determine the appropriateness of bargaining units, and the ability to supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit. These duties are currently performed by the FLRA.

In addition to retaining many of the rights otherwise provided to management under chapter 71 of the *United States Code*, department managers would be granted additional rights under the proposed regulations. For example, management would be given the right "to determine the numbers, types, pay schedules, pay bands and/or grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work."³² Management could also assign employees to meet any operational demand.³³ Under the regulations, management would be prohibited from bargaining not only over the exercise of its rights, but over the procedures it would observe in exercising its rights.

Although the regulations would require the agency and any exclusive representative in any appropriate unit to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement, they also indicate that management would have no obligation to bargain over a change to a condition of employment "unless the change is otherwise negotiable pursuant to [the] regulations and is foreseeable, substantial, and significant in terms of both impact and duration on the bargaining unit, or on those employees in that part of the bargaining unit affected by the change."³⁴ The regulations do not identify when a change would be considered "substantial" and "significant."

The regulations would provide for the establishment of procedures by the Board for the "fair, impartial, and expeditious" assignment and disposition of cases.³⁵ The Board would use a single, integrated process to address disputes and claims, to the extent practicable. To preserve judicial review for a Board decision, a party would have to request review of the record of the Board decision by the FLRA by filing a

³⁰ National Security Personnel System, 70 Fed. Reg. 7,552, 7,597 (proposed Feb. 14, 2005) (to be codified at 5 C.F.R. pt. 9901).

³¹ See National Security Personnel System, 70 Fed. Reg. at 7,595 (defining a component to mean "an organizational unit so prescribed and designated by the Secretary in his or her sole and exclusive discretion, such as, for example, the Office of the Secretary of Defense; the Military Departments, or the Defense Logistics Agency.").

³² National Security Personnel System, 70 Fed. Reg. at 7,597.

³³ *Id.*

³⁴ National Security Personnel System, 70 Fed. Reg. at 7,601.

³⁵ National Security Personnel System, 70 Fed. Reg. at 7,596.

written request within 15 days after the issuance of the decision. Under the regulations, the FLRA would have to accept the findings of fact and interpretations made by the Board and sustain the Board's decision unless the requesting party could show that the Board's decision was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) caused by harmful error in the application of the Board's procedures in arriving at such a decision; or (3) was unsupported by substantial evidence. The FLRA's final decision would be subject to judicial review in accordance with 5 U.S.C. § 7123, which would appear to not be waived for purposes of judicial review.

Provisions Relating to Appellate Procedures.³⁶ The new section, 5 U.S.C. §9902(h), of P.L. 108-136 (1) (A) authorizes the Secretary of Defense to establish an appeals process that must provide employees of DOD organizational and functional units that are included in the NSPS fair treatment in any appeals that they bring in decisions relating to their employment; and (B) mandates that the Secretary in prescribing regulations for that appeals process (i) ensure that these employees are afforded due process protections; and (ii) toward that end, be required to consult with the Merit Systems Protection Board (MSPB) before issuing such regulations. (2) Regulations implementing the appeals process may establish legal standards and procedures for personnel actions, including standards for applicable relief, to be taken for employee misconduct or performance that fails to meet expectations. These standards must be consistent with the public employment principles of merit and fitness set forth in section 2301 of Title 5 of the *United States Code*. (3) Legal standards and precedents applied before the effective date of the new section 9902 of Title 5 by the MSPB and the courts under Chapters 43 (Performance Appraisal), 75 (Adverse Actions) and 77 (Appeals) of Title 5 must apply to DOD employees included in the NSPS, unless these standards and precedents are inconsistent with standards established in section 9902.

(4) An employee who (A) is removed, suspended for more than 14 days, furloughed for 30 days or less, reduced in pay, or reduced in pay band (or comparable reduction) by a final decision under the appeals process established under paragraph 1; (B) is not serving a probationary period under regulations established under paragraph (2); and (C) is otherwise eligible to appeal a performance-based or adverse action under Chapters 43 or 75, as applicable, to the MSPB has the right to petition the full MSPB for a review of the record of that decision pursuant to regulations established under paragraph (2). The board is authorized to dismiss any petition that, in the board's view, does not raise substantial questions of fact or law. No personnel action may be stayed and no interim relief may be granted during the pendency of the board's review unless specifically ordered by the board.

(5) The board is authorized to order corrective action as it considers appropriate only if it determines that the department's decision was (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) obtained without procedures required by law, rule, or regulation having been followed; or (C) unsupported by substantial evidence. (6) An employee who is adversely affected by

³⁶ Almost all of the provisions on appellate procedures derive from S. 1166, with a few changes.

a final order or decision of the MSPB may obtain judicial review of the order or decision as provided in section 7703. The Secretary of Defense, after notifying the OPM Director, may obtain judicial review of any board final order or decision under the same terms and conditions as provided an employee.

(7) Nothing in subsection (h) of the new section 9902 of Title 5 of the *United States Code* should be construed to authorize the waiving of any provision of law, including an appeals provision providing a right or remedy under section 2302(b)(1), (8), or (9) of Title 5 that is not otherwise waivable under subsection (a) of the new section 9902. Section 2302(b)(1) makes it a prohibited personnel practice to discriminate for or against any employee on such bases as race, color, religion, sex, or national origin, age, handicapping conditions under relevant statutes, or marital status or political status under any law, rule, or regulation. Section 2302(b)(8) prohibits personnel actions in reprisal for whistleblowing. Section 2302(b)(9) prohibits personnel actions in reprisal for such things as exercising any right of appeal, complaint, or grievance; cooperating with or disclosing information to the Inspector General or Special Counsel; or refusing to obey an order that would require an individual to violate a law.

(8) The right of an employee to petition the final decision of DOD on an action covered by paragraph (4) of section 9902(h) to MSPB, and the right of the board to review such action or to order corrective action pursuant to paragraph (5), is provisional for seven years after the date Chapter 99 is enacted, and becomes permanent unless Congress acts to revise such provisions.

Chapter 77 is one of the chapters of Title 5 that is subject to waiver or modification by the Secretary of Defense in establishing an HRM system for DOD. Section 7701 of Title 5 grants employees and applicants for employment a right to appeal to MSPB any action which is appealable to the board under any law, rule, or regulation. An appellant has a right to a hearing at which a transcript will be kept and to be represented by an attorney or other representative.

An agency decision is sustained by the board only if it is supported by substantial evidence in the case of an action based on unacceptable performance described in 5 U.S.C. §4303 or a removal from the Senior Executive Service for failing to be recertified or if it is supported by a preponderance of evidence in any other case. Notwithstanding these standards, an agency's decision may not be sustained, if the employee or applicant for employment — (A) shows harmful error in the application of the agency's procedures in arriving at its decision; (B) shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. §2302; or (C) shows that the decision was not in accordance with law.

Section 7702 of Title 5 prescribes special procedures for any case in which an employee or applicant who has been affected by an action appeals to the board and alleges that a basis for the action was discrimination. The board first decides both the appealable action and the issue of discrimination within 120 days after it is filed. In any action before an agency which involves an appealable action and discrimination, the agency must resolve the matter within 120 days. An agency decision is judicially reviewable unless the employee appeals the matter to the board.

Any decision of the board in an appealable action where discrimination has been alleged is judicially reviewable as of the date the board issues its decision if an employee or the applicant does not file a petition for consideration by the Equal Employment Opportunity Commission. Within 30 days after a petition is filed, the commission must decide whether to consider the board's decision. If the commission decides to consider such a decision, within 60 days it must concur in the board's decision or issue a written decision which differs from it. Within 30 days after receiving a commission decision that differs from the board's initial decision, the board must consider the commission's decision and either concur in whole in it or reaffirm its initial decision or reaffirm its initial decision with appropriate revisions. A board decision to concur and adopt in whole a commission decision is judicially reviewable.

If the board reaffirms its initial decision or reaffirms it with revisions that it determines appropriate, the matter must immediately be certified to a special panel comprised of one individual appointed by the President, one board member, and one commission member. Within 45 days after certification, the special panel is required to review the record, decide the disputed issues on the basis of the record, and issue a final decision, which is judicially reviewable. The special panel must refer its decision to the board, which is required to order the agency involved to take any appropriate action to carry out the panel's decision. The panel must permit the employee or applicant who brought the complaint and the agency to appear before it to present oral arguments and to present written arguments.

If prescribed time periods for action by an agency, board, or commission are not met, an employee is entitled to file a civil action in district court under some antidiscrimination statutes. If an agency does not resolve a matter appealable to the board where discrimination has been alleged within 120 days, the employee may appeal the matter to the board. Nothing in section 7702 of Title 5 "Actions Involving Discrimination" can be construed to affect the right to trial de novo in district court under named antidiscrimination statutes after a judicially reviewable action.

Under Section 7703 of Title 5, any employee or applicant who is adversely affected or aggrieved by a final order or decision of the MSPB may obtain judicial review of the order or decision. Except in cases involving allegations of discrimination, a petition to review a final board order or decision must be filed with the United States Court of Appeals for the Federal Circuit within 60 days after the petitioner received notice of the final order or decision. Cases involving discrimination must be filed in district court under procedures prescribed in antidiscrimination statutes within 30 days after the individual filing the case receives notice of a judicially reviewable action. In any case filed with the Federal Circuit Court of Appeals, the court is required to hold unlawful and set aside any agency action, findings, or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulations having been followed; or (3) unsupported by substantial evidence, except that in the case of discrimination brought under named antidiscrimination statutes, an employee or applicant has a right to have the facts heard in a trial de novo by a reviewing court.

Implementation. Subpart G of the proposed regulations on adverse actions contains prescribes procedural requirements for employees who are removed, suspended, furloughed for 30 days or less, reduced in pay, or reduced in a pay band (or comparable reduction). DOD may prescribe implementing issuances to carry out the provisions of the subpart. With respect to any covered category of employee, these regulations waive and replace relevant subchapters of Chapter 75, “Adverse Actions,” and Chapter 43, “Performance Appraisal,” of Title 5 of the *United States Code*.

The regulations authorize the Department to take an adverse action under this subpart for such cause as will promote the efficiency of the service. It grants to the Secretary of Defense sole, exclusive, and unreviewable discretion to identify “mandatory removal offenses” — those that have a direct and substantial adverse effect on the Department’s national security mission. These offenses will be identified in advance as part of departmental regulations and employees will be notified when they are identified. The Secretary also is given the sole, exclusive, and unreviewable discretion to mitigate the removal penalty on his or her own initiative or at the request of the employee in question.

An employee against whom an adverse action is proposed is entitled to (a) a proposal notice, (b) an opportunity to reply, and (c) a decision notice. The Department must provide at least 15 days advance written notice of a proposed adverse action, unless there is reasonable cause to believe that the employee has committed a crime for which a prison sentence may be imposed, in which case the advance notice period can be shortened to at least five days.

Covered DOD employees are given at least ten days, which run concurrently with the notice period, to reply orally and/or in writing. If there is reasonable cause to believe that the employee has committed a crime for which a prison sentence may be imposed, however, the Department must provide at least five days, which run concurrently with the notice period, to reply orally and/or in writing. The opportunity to reply orally does not include the right to a formal hearing with examination of witnesses. The Department is required to designate an official to receive the employee’s written and/or oral response. That official has authority to make or recommend a final decision on the proposed adverse action. The employee may be represented by an attorney or other representative of the employee’s choice and at the employee’s expense, but the Department may disallow a representative under some conditions.

In arriving at its decision on an adverse action, DOD may not consider any reasons other than those specified in the proposal notice. The Department must consider any response from the employee and the employee’s representative, as well as any medical documentation furnished in accordance with relevant regulations, if the response is provided to the official who has been designated to receive the employee’s written or oral response and if the response is provided during the opportunity-to-reply period. The decision notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights. To the extent practicable, the Department must deliver the notice to the employee on or before the effective date of the action. If the notice cannot be delivered in person, the Department may mail the notice to the employee’s last known address of record.

The Department is required to keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. DOD must make the record available for review by the employee and furnish a copy of the record upon request of the employee or the Merit Systems Protection Board (MSPB). The requirements in Subpart G do not apply to adverse actions proposed prior to the date of an affected employee's coverage under the subpart.

Subpart H of the proposed regulations on appeals implements the provisions of Section 9902(h) of title 5 of the *United States Code*, which establishes the system for DOD employees to appeal certain adverse actions covered under Subpart G. In applying existing legal standards and precedents, the MSPB is bound by regulations set forth in Section 9901.107(a)(2) of the DOD regulations, which provide that the DOD regulations must be interpreted in a way that recognizes the critical national security mission of the Department of Defense and that each provision must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission as defined by the Secretary of Defense.

When a specified category of employees is covered by an appeals system established under this subpart, these regulations waive the provisions of Section 7701, "Appellate procedures," of Title 5 of the *United States Code* established for that category to the extent that they are inconsistent with the subpart. The regulation involving discrimination, Section 9901.809, modifies the provisions of Section 7702, "Actions involving discrimination," of Title 5 of the *United States Code*. The appellate procedures specified in Subpart H supersede those of the MSPB to the extent that the MSPB regulations are inconsistent with the subpart. MSPB is required to follow the provisions of Subpart H until it issues conforming regulations, which may not conflict with the part establishing the DOD regulations.

Appellate procedures in Subpart H, subject to a determination by the Secretary of Defense, apply to employees in DOD organizational and functional units included under the NSPS who appeal removals; suspensions for more than 14 days, including indefinite suspensions; furloughs of 30 days or less; reductions in pay; or reductions in a pay band (or comparable reductions), which constitute appealable adverse actions for the purpose of the subpart, provided that they are covered by the adverse actions procedures in Subpart G.

DOD recognizes the value of using alternative dispute resolution methods such as mediation, an ombudsman, or interest-based problem-solving to address employee-employer disputes and encourages using alternative dispute resolution. The methods are subject to collective bargaining under Subpart I, "Labor Management Relations," of the DOD regulations.

A covered DOD employee may appeal an appealable adverse action to the MSPB. The employee has a right to be represented by an attorney or other representative of his or her own choosing. The MSPB is required to refer all appeals to an administrative judge for adjudication. The administrative judge must make a decision at the close of the review and provide a copy of the decision to each party to the appeal and to OPM.

An adverse action taken against an employee must be sustained by the MSPB administrative judge if it is supported by a preponderance of evidence, unless the employee shows by a preponderance of the evidence that (1) there was harmful error in the application of DOD procedures in arriving at the decision; (2) the decision was based on any prohibited personnel practice; or (3) the decision was not in accordance with law. "Preponderance of the evidence" is defined as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

An employee will not be granted interim relief, nor will an action taken against an employee be stayed, unless specifically ordered by the full board after a final decision by the Department of Defense. Neither the MSPB administrative judge nor the full MSPB may reverse an action of DOD based on the way in which the charge is labeled or the conduct characterized, provided that the employee is on notice of the facts sufficient to respond to the factual allegations of the charge. Moreover, neither the MSPB administrative judge nor the full MSPB may reverse the Department's action based on the way a performance expectation is expressed, provided that the expectation would be clear to a reasonable person.

The Director of OPM may, as a matter of right at any time in the proceeding, intervene or otherwise participate in any proceeding in any case in which the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

Except in cases involving an allegation of discrimination, any initial decision by an MSPB administrative judge is final unless a party to the appeal or the OPM Director petitions the full board for review within 30 days. In cases other than those involving a prohibited personnel practice based on discrimination on various grounds under Section 2302(b)(1), "Prohibited personnel practices," of Title 5 of the *United States Code*, the administrative judge may require the Department to pay reasonable attorney fees incurred by an employee if the employee is the prevailing party and the administrative judge determines that payment by the Department is warranted in the interest of justice. Attorney fees are warranted in the interest of justice only when the Department is engaged in a prohibited personnel practice or the Department's action was clearly without merit based upon facts known to management when the action was taken. If the employee is the prevailing party and the decision is based on a finding of a prohibited personnel practice involving discrimination under 5 U.S.C. Section 2302(b)(1), the payment of reasonable attorney fees must be in accordance with standards prescribed in the relevant section of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), "Attorney's fee; liability of the Commission and United States for costs."

All appeals, including class appeals, must be filed no later than 20 days after the effective date of the action being appealed, or not later than 20 days after the date of service of the Department's decision, whichever is later. If the MSPB administrative judge determines upon his or her own initiative or upon request by either party that some or all facts are not in genuine dispute, the administrative judge may, after notifying the parties and providing them an opportunity to respond within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

The Department's determination regarding the penalty imposed must be given great deference. An arbitrator, administrative judge, or the full MSPB may not modify the penalty imposed by DOD unless the penalty is so disproportionate to the basis for the action as to be wholly without justification. In cases of multiple charges, the third party's determination in this regard is based on the justification for the penalty as it related to the sustained charge or charges. When a penalty is mitigated, the maximum justifiable penalty must be applied. The maximum justifiable penalty is the severest penalty that is not so disproportionate to the basis for the action as to be wholly without justification, unless the adverse action is based on a mandatory removal offense, which has a separate rule.

An initial decision must be made by an administrative judge of the MSPB no later than 90 days after the date on which the appeal is filed. Such an initial decision becomes the final decision of the Department of Defense 30 days after it is issued, unless either party files a request for review (RFR) with MSPB and the Department concurrently (with service to the other party, as specified by DOD implementing issuances) within that 30-day period.

Thirty days after the timely filing of a request for review of an initial decision of an administrative judge, that initial decision becomes the final DOD decision and that decision is nonprecedential. The MSPB is required to docket and process a party's request for review as a petition for full MSPB review (PFR) in accordance with 5 U.S.C. Section 9902(h), "Establishment of the human management resources system," MSPB's regulations, and Subpart H, "Appeals," unless DOD notifies the parties and MSPB within that 30-day period that the Department will act on the request for review and review the initial decision of the MSPB administrative judge.

Any decision that DOD issues after reviewing an initial decision of the MSPB administrative judge is precedential unless (1) DOD determines that its decision is not precedential; or (2) the final decision is reversed or modified by the full MSPB. Upon giving notice that DOD will reconsider the initial decision of the administrative judge, the Department must provide the other party to the case 15 days to respond to the request for review. After receiving a timely response to this request, the Department may (1) remand the matter to the assigned administrative judge or issue a final DOD decision modifying or reversing that initial decision or decision after remand; (2) issue a final DOD decision modifying or reversing the initial decision; or (3) issue a final DOD decision affirming that initial decision which should serve as a precedent. An administrative judge must make a decision after remand under (1) no later than 30 days after receiving a remand notice.

Upon receiving a final DOD decision issued pursuant to the authorities in the previous paragraph, an employee or OPM may file a petition for review with the full board within 30 days under 5 U.S.C. Section 9002(h), which prescribes appellate procedures, MSPB's regulations and Subpart H, "Appeals." Section 9902(h) of Title 5 of the *United States Code* grants an eligible employee who is removed, suspended for more than 14 days, furloughed for 30 days or less, reduced in pay, or reduced in a pay band (or comparable reduction) by a final decision under the appeals process the right to petition the full MSPB for review of the decision. This subsection also authorizes the board to dismiss any petition that, in the view of the board, does not raise substantial questions of law or fact. No personnel action can be stayed and no

interim relief can be granted during the pendency of the board's review unless specifically ordered by the board.

Upon receiving a petition for full MSPB review or a request for review that becomes a petition for review as a result of the expiration of DOD's reconsideration period, the other party to the case and/or OPM, as applicable, has 30 days to file a response to the petition. The full MSPB is required to act on a petition for review within 90 days after receiving a timely response or the expiration of the response period, as applicable. The OPM Director, after consulting with the Secretary of Defense, may seek reconsideration by MSPB of a final board decision. If the Director seeks reconsideration, the full board must render its decision no later than 60 days after receiving a response to OPM's petition in support of reconsideration and state reasons for its decision.

Failure of MSPB to meet deadlines imposed by provisions relating to an initial decision by an administrative judge, a decision by the full board on a petition for review, and board reconsideration sought by the OPM Director does not prejudice any party to the case and does not form the basis for any legal action by any party. If the administrative judge or the full board fails to meet time limits, the full board is required to inform the Secretary of Defense in writing of the cause of the delay and recommend future actions to remedy the problem. The Secretary of Defense or an employee adversely affected by a final order or decision of MSPB may seek judicial review under Section 9002(h) of Title 5 of the *United States Code*, which authorizes an adversely affected employee and the Secretary to obtain judicial review as provided in 5 U.S.C. Section 7703, "Judicial review of decisions of the Merit Systems Protection Board." Before seeking judicial review, the Secretary make seek reconsideration by MSPB of a final MSPB decision.

Procedures for appeals of adverse actions to MSPB based on mandatory removal offenses are the same as for other offenses, except that if one or more mandatory removal offenses is or are sustained, neither the MSPB administrative judge nor the full board may mitigate the penalty; only the Secretary of Defense may mitigate it. If the administrative judge or full board sustains an employee's appeal based on a finding that the employee did not commit a mandatory removal offense, DOD is not precluded from subsequently proposing an adverse action (other than a mandatory removal offense) based in whole or in part on the same or similar evidence.

In considering any appeal of an action filed under Section 7702, "Actions involving discrimination," of Title 5 of the *United States Code*, the Merit Systems Protection Board is required to apply the provisions of 5 U.S.C. Section 9902, "Establishment of human resources system," and these DOD regulations. In any appeal of an action filed under 5 U.S.C. Section 7702 that results in a decision of DOD, if no petition for review of the Department's decision is filed with the full board, the Department must refer only the discrimination issue to the full board for adjudication. All references in 5 U.S.C. Section 7702 to 5 U.S.C. Section 7701, "Appellate procedures," are modified to read Part 9901, "Department of Defense National Security Personnel System," of Title 5 of the *Code of Federal Regulations*. Subpart H does not apply to adverse actions that were proposed prior to the date of an affected employee's coverage under this subpart.

Provisions Related to Separation and Retirement Incentives. Under current law, a federal agency that is restructuring or downsizing can, with the approval of OPM, offer voluntary early retirement to employees in specific occupational groups, organizational units, or geographic locations who are age 50 or older and have at least 20 years of service, or who are any age and have at least 25 years of service. Also with the approval of OPM, a federal agency may offer voluntary separation incentive payments of up to \$25,000 to employees who retire or resign. The full amount must be repaid if individual is re-employed by the federal government within five years.

P.L. 108-136 creates a new Section 9902(i) of Title 5 that authorizes the Secretary of Defense, without review by OPM, to establish a program within DOD under which employees may be eligible for early retirement, offered separation incentive pay to separate from service voluntarily, or both. The authority may be used to reduce the number of personnel employed by DOD or to restructure the workforce to meet mission objectives without reducing the overall number of personnel. It is in addition to, and notwithstanding, any other authorities established by law or regulation for such programs.

The Secretary may not authorize the payment of voluntary separation incentive pay (VSIP) to more than 25,000 employees in any fiscal year, except that employees who receive VSIP as a result of a closure or realignment of a military installation under the Defense Base Closure and Realignment Act of 1990 (Title XXIX of P.L. 101-510) will not be included in that number. The Secretary must prepare a report each fiscal year setting forth the number of employees who received such pay as a result of a closure or realignment of a military base and submit it to the Senate Committees on Armed Services and Governmental Affairs and the House Committees on Armed Services and Government Reform.

“Employee” means a DOD employee serving under an appointment without time limitation. The term does not include (A) a reemployed annuitant under 5 U.S.C. Subchapter III, Chapters 83 or 84, or another retirement system for federal employees; (B) an employee having a disability on the basis of which he or she is or would be eligible for disability retirement; or (C) for purposes of eligibility for separation incentives, an employee who has received a decision notice of involuntary separation for misconduct or unacceptable performance.

An employee who is at least 50 years of age and has completed 20 years of service, or has at least 25 years of service, could, pursuant to regulations promulgated under this section, apply and be retired from DOD and receive benefits in accordance with Chapters 83 or 84 if he or she has been employed continuously within DOD for more than 30 days before the date on which the determination to conduct a reduction or restructuring within one or more DOD components is approved.

Separation pay will be paid in a lump sum or in installments and will be equal to the lesser of (i) an amount equal to the amount the employee would be entitled to receive under 5 U.S.C. 5595(c), if the employee were entitled to payment; or (ii) \$25,000. Separation pay is not a basis for payment, and is not included in the computation, of any other type of government benefit. It will not be taken into account to determine the amount of any severance pay to which an individual could

be entitled under 5 U.S.C. 5595, based on any other separation. If paid in installments, separation pay will cease to be paid upon the recipient's acceptance of federal employment, or commencement of work under a personal services contract.

An employee who receives separation pay may not be reemployed by DOD for a 12-month period beginning on the effective date of the employee's separation, unless this prohibition is waived by the Secretary on a case-by-case basis. An employee who receives separation pay on the basis of a separation occurring on or after the enactment date of the Federal Workforce Restructuring Act of 1994 (P.L. 103-236) and accepts employment with the federal government, or who commences work through a personal services contract with the United States within five years after the date of the separation on which payment of the separation pay is based, would be required to repay the entire amount of the separation pay to DOD. If the employment is with an executive agency other than DOD, the OPM Director could, at the request of the agency head, waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position. If the employment is within DOD, the Secretary could waive the repayment if the individual involved is the only qualified applicant available for the position. If the employment is with an entity in the legislative branch, or with the judicial branch, the head of the entity or the appointing official, or the Director of the Administrative Office of the U.S. Courts, could waive the repayment if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

Under this program, early retirement and separation pay may be offered only pursuant to regulations established by the Secretary, subject to such limitations or conditions as the Secretary may require.

Implementation. The Deputy Under Secretary of Defense for Civilian Personnel Policy, Ginger Groeber, issued a memorandum to implement the voluntary separation incentive payments (buyouts) and the voluntary early retirement provisions on December 30, 2004. Buyouts are limited to 25,000 employees annually. For FY2004, the Army, Navy, Air Force, and Defense agencies were allocated 7,722; 7,135; 5,873; and 4,270 buyouts, respectively. Voluntary early retirements are not limited. To be eligible for a buyout, an individual must have been employed by DOD for a continuous period of at least 12 months. According to the DOD guidance, members of the Senior Executive Service and employees above GS-15 are not eligible for buyouts or early retirement unless the Principal Deputy Under Secretary of Defense for Personnel and Readiness approves the action to avoid a reduction in force or to restructure the workforce.³⁷

Provisions Relating to Reemployment. Under current law, a retired federal employee who is re-employed by the federal government may not receive a federal retirement annuity and a federal salary simultaneously. Sections 8344 (Civil Service Retirement System (CSRS)) and 8468 (Federal Employees' Retirement System (FERS)) of Title 5 provide that if a retired federal employee who is receiving

³⁷ U.S. Department of Defense, Office of the Under Secretary of Defense for Personnel and Readiness, "National Security Personnel System — Voluntary Separation Incentive Pay (VSIP) and Voluntary Early Retirement Authority (VERA) Policy," Dec. 30, 2003.

an annuity from the Civil Service Retirement and Disability Fund is re-employed by a federal agency, an amount equal to the annuity shall be deducted from his or her pay. If re-employment lasts more than one year, the individual will be eligible for a supplemental annuity for the period of re-employment when he or she retires.

P.L. 108-136 creates a new Section 9902(j) of Title 5 that provides that if a retired federal employee who is receiving an annuity from the Civil Service Retirement and Disability Fund were to be employed by DOD, his or her annuity would continue. The employee would not accrue additional credit under either CSRS or FERS during this period of re-employment.

Implementation. On March 18, 2004, the Under Secretary of Defense for Personnel and Readiness, David Chu, issued a memorandum to implement the reemployment provisions. According to Mr. Chu, “This critical hiring flexibility will help address the challenges of ‘retirement-driven talent drain’ as our current generation of dedicated civil servants become eligible to retire.” Under the DOD guidance, annuitants may be reemployed:

In positions that are hard-to-fill as evidenced by historically high turnover, a severe shortage of candidates or other significant recruiting difficulty; or positions that are critical to the accomplishment of the organization’s mission; or to complete a specific project or initiative;

[If they] have unique or specialized skills, or unusual qualifications not generally available; or

For not more than 2087 hours (e.g., one year full time, or two years part time) to mentor less experienced employees and/or to provide continuity during critical organizational transitions. Extensions beyond 2087 hours are not authorized.³⁸

The next-level manager or supervisor must certify in writing that one or more of the above conditions exists if a retiree seeks to return to the same or a substantially similar position as the one from which he or she retired. If less than 90 days has elapsed between the retirement and the reemployment, the certification must indicate that retention options were considered and offered to the employee before retirement. The DOD guidance covers annuitants who are rehired after November 23, 2004. The Deputy Under Secretary of Defense for Civilian Personnel Policy will monitor the use of the reemployment authority and may establish reporting requirements.

Additional Provisions Relating to Personnel Management. Notwithstanding Section 9902(d), the Secretary of Defense, in establishing and implementing the NSPS, is not limited by any provision of Title 5 or any rule or regulation prescribed under Title 5 in establishing and implementing regulations relating to —

(A) the methods of establishing qualification requirements for, recruitment for, and appointments to positions;

³⁸ U.S. Department of Defense, Under Secretary of Defense for Personnel and Readiness, “Employment of Annuitants,” Mar. 18, 2004.

(B) the methods of assigning, reassigning, detailing, transferring, or promoting employees; and

(C) the methods of reducing overall agency staff and grade levels, except that performance, veterans' preference, tenure of employment, length of service, and such other factors as the Secretary considers necessary and appropriate must be considered in decisions to realign or reorganize the Department's workforce.

In implementing this subsection, the Secretary must comply with 5 U.S.C. §2302(b)(11), regarding veterans' preference requirements.

Phase-In. The Secretary may apply the NSPS to an organizational or functional unit that includes up to 300,000 civilian DOD employees and to an organizational or functional unit that includes more than 300,000 civilian DOD employees, if the Secretary determines that the department has in place a performance management system that meets the criteria specified. (S. 1166 included a similar phase-in provision.)

Section 9903. Attracting Highly Qualified Experts³⁹

The new Section 9903 authorizes the Secretary of Defense to carry out a program in order to attract highly qualified experts in needed occupations, as determined by him. Under the program, the Secretary may appoint personnel from outside the civil service and uniformed services (as such terms are defined in 5 U.S.C. §2101) to positions in DOD without regard to any provision of Title 5 governing the appointment of employees to positions in DOD. The Secretary also may prescribe the rates of basic pay for positions to which employees are appointed at rates not in excess of the maximum rate of basic pay authorized for senior-level positions under 5 U.S.C. §5376 (Executive Schedule (EX) Level IV, \$140,300 as of January 2005), as increased by locality-based comparability payments (total cannot exceed EX level III, \$149,200 as of January 2005), notwithstanding any provision of Title 5 governing the rates of pay or classification of employees in the executive branch. The Secretary may pay any employee appointed under this section payments in addition to basic pay within the limits applicable to the employee as discussed below.

The service of an employee under an appointment made pursuant to this section may not exceed five years. The Secretary may, however, in the case of a particular employee, extend the period to which service is limited by up to one additional year if he determines that such action is necessary to promote DOD's national security missions.

The total amount of the additional payments paid to an employee under this section for any 12-month period may not exceed the lesser of \$50,000 in FY2004, or an amount equal to 50% of the employee's annual rate of basic pay. The \$50,000 may be adjusted annually thereafter by the Secretary, with a percentage increase equal to one-half of one percentage points less than the percentage by which the Employment Cost Index (ECI), published quarterly by the Bureau of Labor Statistics, for the base quarter of the year before the preceding calendar year exceeds the ECI

³⁹ 117 Stat. 1632-1633.

for the base quarter of the second year before the preceding calendar year. “Base quarter” has the same meaning given at 5 U.S.C. §5302(3).

An employee appointed under this section is not eligible for any bonus, monetary award, or other monetary incentive for service except for payments authorized under this section. Notwithstanding any other provision of this subsection or of 5 U.S.C. §5307, no additional payments may be paid to an employee in any calendar year, if, or to the extent that, the employee’s total annual compensation will exceed the maximum amount of total annual compensation payable to the Vice President (\$208,100).

The number of highly qualified experts appointed and retained by the Secretary may not exceed 2,500 at any time. (Under S. 1166, the limitation would have been 300.)

In the event that the Secretary terminates this program, the following will occur. In the case of an employee who on the day before the termination of the program is serving in a position pursuant to an appointment under this section, the termination of the program does not affect the employee’s employment in that position before the expiration of the lesser of the period for which the employee was appointed or the period to which the employee’s service is limited, including any extension made under this section before the termination of the program. The rate of basic pay prescribed for the position may not be reduced as long as the employee continues to serve in the position without a break in service.

The committee report which accompanied H.R. 1836 stated that “[t]he authority [in this provision] is consistent with that now available to the Defense Advanced Research Projects Agency and Military Departments for hiring scientists and engineers.”⁴⁰

Implementation. DOD issued guidance to implement the provision on highly qualified experts on February 27, 2004. The guidance identifies such an expert as:

an individual possessing uncommon, special knowledges or skills in a particular occupational field beyond the usual range of expertise, who is regarded by others as an authority or practitioner of unusual competence and skill. The expert knowledge or skills are generally not available within the Department and are needed to satisfy an emerging and relatively short-term, non-permanent requirement.⁴¹

The hiring authority cannot be used to provide temporary employment in anticipation of permanent employment, to provide services that are readily available with DOD or another federal agency, to perform continuing DOD functions, to bypass or undermine personnel ceilings or pay limitations, to aid in influencing or

⁴⁰ H.Rept. 108-116, Part 1, p. 33. This provision in H.R. 1588, as passed by the House of Representatives, was Sec. 102(a) of H.R. 1836, as reported.

⁴¹ U.S. Department of Defense, Under Secretary of Defense for Personnel and Readiness, Memorandum for Secretaries of the Military Departments, “Employment of Highly Qualified Experts,” Feb. 27, 2004.

enacting legislation, to give former federal employees preferential treatment, to do work performed by regular employees, or to fill in during staff shortages.⁴²

Basic pay for experts would be determined according to such factors as:

- Labor market conditions;
- Type of position;
- Location of position;
- Work schedule;
- Level of independence in establishing work objectives;
- Working conditions;
- Organizational needs;
- Personal qualifications;
- Type of degree;
- Personal recommendations;
- Experience (recency, relevance);
- Budget considerations;
- Organizational equity/pay considerations; and
- Mission impact of work assignments.⁴³

An expert's pay may be increased because of an "exceptional level of accomplishment related to projects, programs, or tasks that contribute to the Department or Component strategic mission."⁴⁴

The Defense Civilian Personnel Data System will be used to record the employment of highly qualified experts. Written documentation must be maintained and must include the criteria for the appointment and the factors and criteria used to set and increase pay and to provide additional payments. The records must be retained for three years after an employee is terminated.⁴⁵

Section 9904. Special Pay and Benefits for Certain Employees Outside the United States⁴⁶

The new Section 9904 of P.L. 108-136 authorizes the Secretary of Defense to provide allowances and benefits to certain civilian DOD employees assigned to activities outside the United States, as determined by the Secretary to be in support of DOD activities abroad hazardous to life or health or so specialized because of security requirements as to be clearly distinguishable from normal government employment. Such allowances and benefits will be comparable to those provided by the Secretary of State to members of the Foreign Service under Chapter 9 of Title I of the Foreign Service Act of 1980 or any other provision of law; or comparable to

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ 117 Stat. 1633.

those provided by the Director of Central Intelligence to personnel of the Central Intelligence Agency (CIA). Special retirement accrual benefits and disability that are in the same manner provided for by the CIA Retirement Act and in Section 18 of the CIA Act of 1949 also will be provided.

Impact on Department of Defense Civilian Personnel

Section 1101(b) of P.L. 108-136 provides that any exercise of authority under the proposed new Chapter 99, including under any system established under that chapter, must be in conformance with the requirements of this subsection. No other provision of this act or of any amendment made by this act may be construed or applied in a manner so as to limit, supersede, or otherwise affect the provisions of this section, except to the extent that it does so by specific reference to this section.

Department of Defense Civilian Personnel Generally — Title XI, Subtitle B, of P.L. 108-136

Military Leave for Mobilized Federal Civilian Employees⁴⁷

Section 1113 of P.L. 108-136 amends 5 U.S.C. §6323 to authorize military leave for an individual who performs full-time military service as a result of a call or order to active duty in support of a contingency operation.⁴⁸ Under military leave, the individual receives leave without loss of, or reduction in, pay, leave to which he or she is otherwise entitled, credit for time or service, or performance or efficiency rating, for up to 22 workdays in a calendar year. The provision applies to military service performed on or after the act's enactment date, November 24, 2003.

The committee report accompanying H.R. 1836 explained the need for the provision:

This section would help Federal civilian employees whose military pay is less than their Federal civilian salary “transition” to military service by allowing them to receive 22 additional workdays of military leave when mobilized. Such leave would help alleviate the difference in pay for the first month of service by enabling them to receive the difference between their Federal civilian pay and their military pay. Current law only entitles Reserve component members to the additional military leave.⁴⁹

⁴⁷ 117 Stat. 1635.

⁴⁸ Contingency operation is defined as a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. It also could be a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

⁴⁹ H.Rept. 108-116, part 1, p. 34. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 203 of H.R. 1836, as reported.

Extension of Authority for Experimental Personnel Program for Scientific and Technical Personnel⁵⁰

Section 1116 amends Subsection (e)(1) of Section 1101 of the Strom Thurmond National Defense Authorization Act for FY1999 (P.L. 105-261; 112 Stat. 2139; 5 U.S.C. §3104 note) to extend the experimental personnel program for scientific and technical personnel until September 30, 2008 (the annual report will be required in 2009).

Subtitle B of Title XI of P.L. 108-136 also includes provisions on an automated personnel management program, the demonstration project relating to certain acquisition personnel management, restoration of annual leave to certain DOD employees affected by base closings, and employment of certain civilian faculty members at a Defense institution, which are beyond the purview of this report.

Department of Defense Civilian Personnel Generally — Title XI, Subtitle C, of P.L. 108-136

The provisions at Subtitle C of Title XI of P.L. 108-136 apply to federal civilian employees government-wide.

Modification of the Overtime Pay Cap⁵¹

Section 1121 amends 5 U.S.C. §5542(a)(2) which covers the computation of overtime rates of pay. It provides that such an employee will receive overtime at a rate which will be the greater of one and one-half times the hourly rate for GS-10, step 1, or his or her hourly rate of basic pay. The law previously in effect provided that an employee whose basic pay rate exceeded GS-10, step 1 (including any locality pay or special pay rate) received overtime at a rate of one and one-half times the hourly rate for GS-10, step 1 (150% of GS-10, step 1).

For employees whose regular pay is greater than the 150% of GS-10, step 1 cap, the law previously in effect resulted in overtime pay at a rate less than their regular hourly rate. P.L. 108-136 addresses this circumstance and the situation in which managers and supervisors, whose overtime rate is capped at 150% of GS-10, step 1, receive less compensation for overtime work than employees who are subordinate to them. The Congressional Budget Office (CBO) determined that the provision would affect employees above GS-12, step 5.⁵²

Implementation. OPM advised agencies to ensure that proper overtime payments were being made as of November 24, 2003, the law's enactment date.

⁵⁰ 117 Stat. 1636.

⁵¹ 117 Stat. 1636.

⁵² H.Rept. 108-116, part 1, p. 54.

Final regulations to implement the provision were published by OPM in the *Federal Register* on May 13, 2004, and became effective on the same day.⁵³

Common Occupational and Health Standards for Differential Payments as a Consequence of Exposure to Asbestos⁵⁴

Section 1122 amends 5 U.S.C. §5343(c)(4), which authorizes blue-collar employees to receive pay differentials for unusually severe working conditions or unusually severe hazards, and 5 U.S.C. §5545(d), which authorizes pay differentials for unusual physical hardship or hazard for General Schedule (GS) employees. The amendment provides that pay differentials for any hardship or hazard related to asbestos will be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970. Subject to any vested constitutional property rights, any administrative or judicial determination after the act's enactment date concerning backpay for a differential under 5 U.S.C. §5343(c)(4) or 5545(d) will be based on occupational safety and health standards under the Occupational Safety and Health Act of 1970.

The Congressional Budget Office (CBO) explained the provision in its cost estimate for H.R. 1836. According to CBO, the provision provides that

federal wage-grade employees would be subject to the same standards as general schedule employees when determining eligibility for environmental differential pay (EDF) due to exposure to asbestos. Under current law, general schedule employees are entitled to 8 percent hazard differential pay [HDP] if they are exposed to asbestos that exceeds the permissible exposure limits established by OSHA. The current EDP standard for wage-grade employees entitles them to the same 8 percent of pay but does not set an objective measure for determining the level of asbestos exposure necessary to qualify for EDP. In several instances when wage-grade employees have sought back pay for EDP, arbitrators have found in favor of the employees when asbestos levels were below those consistent with OSHA standards.⁵⁵

Implementation. According to OPM, administrative or judicial determinations concerning EDP or HDP for asbestos exposure must be based on the OSHA permissible exposure limits for asbestos as of November 24, 2003. OPM regulations on HDP for GS employees include this requirement. The personnel agency will update the EDP regulations for wage employees to include the requirement.

⁵³ U.S. Office of Personnel Management, "Pay Administration (General)," *Federal Register*, May 13, 2004, vol. 69, no. 93, pp. 26475-26476.

⁵⁴ 117 Stat. 1636-1637.

⁵⁵ H.Rept. 108-116, part 1, pp. 53-54. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 204 of H.R. 1836, as reported. The complete Congressional Budget Office cost estimate is at pp. 51-58 of H.Rept. 108-116, part 1.

Increase in Annual Student Loan Repayment Authority⁵⁶

Section 1123 amends 5 U.S.C. §5379(b)(2)(A) to provide that student loan repayments to an employee may not exceed \$10,000 in any calendar year, replacing the up to \$6,000 per calendar year that the current law allows. The provision became effective on January 1, 2004.

Given the increasingly larger burdens of debt that graduates are assuming, this provision could provide additional flexibility to managers and agencies wanting to offer student loan repayments to their employees. Federal agencies have said that they would need additional appropriations to fund such incentives as student loan repayments.

Implementation. OPM issued regulations to implement the program on April 20, 2004.⁵⁷

Authorization for Cabinet Secretaries, Secretaries of Military Departments, and Heads of Executive Agencies to be Paid on a Biweekly Basis⁵⁸

Section 1124 “allow[s] cabinet secretaries, secretaries of military departments and heads of executive agencies to be paid bi-weekly like most Federal employees. This proposal save[s] time and cost resources by relieving civilian pay and disbursing operations from having to utilize special manual procedures to accommodate these personnel.”⁵⁹

Section 5504 of Title 5 is modified by consolidating the definition of employee for the purpose of the section so that the same groups are covered by the requirement for a bi-weekly pay period and by the methods for converting annual rates of pay into hourly, daily, weekly, or biweekly rates. Currently “employee” is defined under each of these provisions and both exclude groups of people excluded from the definitions of employees in 5 U.S.C. §5541 on premium pay. P.L. 108-136 continues that exclusion, but adds a provision that an agency could elect to have excluded employees be paid on the bi-weekly basis. It should be noted that under the current provisions, employees in the judicial branch are covered under the conversion language, but are not included in the language of this provision. It is not known if that omission was by intent or if the latitude for discretionary inclusion was assumed to apply to that class of employee.

Implementation. The provision became effective on the first day of the first applicable pay period beginning on or after November 24, 2003, which was

⁵⁶ 117 Stat. 1637.

⁵⁷ U.S. Office of Personnel Management, “Repayment of Student Loans,” *Federal Register*, Apr. 20, 2004, vol. 69, no. 76, p. 21039.

⁵⁸ 117 Stat. 1637-1638.

⁵⁹ H.Rept. 108-116, part 1, p. 35. The language in H.R. 1588, as passed by the House of Representatives, is identical to the language in Sec. 206 of H.R. 1836, as reported.

November 30, 2003, for most officials and employees. OPM published proposed regulations to implement the provision in the *Federal Register* on October 7, 2004.⁶⁰

Senior Executive Service Pay System⁶¹

Section 1125(a), which amended portions of 5 U.S.C. §§ 5304, 5382, and 5383, effected changes to basic pay and locality pay for members of the Senior Executive Service (SES), and individuals in certain other positions. OPM issued the final rule to establish the new pay system, and to implement a higher cap on aggregate compensation for senior executives, in December 2004.⁶² Significant changes for the SES included the replacement of six pay rates or levels (ES-1 through ES-6) with one broad pay range; an increase in the cap on base pay from Executive Schedule level IV (EX-IV) to EX-III; the addition of a second, higher cap on base pay, EX-II, for agencies whose SES performance appraisal systems have been certified by the OPM, with the concurrence of OMB; and the elimination of locality pay. Each senior executive is to be paid at one of the rates within the broad pay range based on individual performance, contribution to the agency's performance, or both. Previously, 5 U.S.C. § 5382 required the establishment of at least five rates of basic pay, and each senior executive was paid at one of the rates. For agencies whose appraisal systems have not been certified, the cap on SES base pay in 2005 is \$149,200 (EX-III). (Previously, the cap would have been \$140,300 (EX-IV).) For agencies who have received certification, the cap on base pay in 2005 is \$162,100 (EX-II). Demonstrating that the design and implementation of its performance appraisal systems make "meaningful distinctions based on relative performance" is crucial to an agency's application for certification.⁶³ (An agency may have more than one performance appraisal system for senior employees.)

Instituting a pay band and shifting the cap on basic pay from level IV to level III (or level II for agencies with certified appraisal systems) will help to ease pay compression, at least temporarily, within the SES. Many believe this provision has the potential for interjecting more accountability into the SES. Others are concerned that in an effort to develop and apply a performance appraisal system that is based on meaningful distinctions, agencies might create and impose a forced distribution of performance ratings.

In addition to positions in the SES, positions in the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) SES, and positions

⁶⁰ U.S. Office of Personnel Management, "Computation of Pay for Biweekly Pay Periods," *Federal Register*, Oct. 7, 2004, vol. 69, no. 194, pp. 60097-60098.

⁶¹ 117 Stat. 1638-1640.

⁶² U.S. Office of Personnel Management, "Senior Executive Service Pay and Performance Awards; Aggregate Limitation on Pay," *Federal Register*, vol. 69, no. 233, Dec. 6, 2004, pp. 70355-70367.

⁶³ U.S. Office of Personnel Management and U.S. Office of Management and Budget, "Executive Performance and Accountability," *Federal Register*, vol. 69, no. 145, July 29, 2004, p. 45551. See Kay Coles James, Director, U.S. Office of Personnel Management, "Certification of Performance Appraisal Systems for Senior Employees," memorandum, July 26, 2004, available at [<http://www.opm.gov/oca/compmemo>], visited Jan. 11, 2005.

in a system equivalent to the SES, as determined by the President's Pay Agent, are no longer eligible for locality pay. Considering the changes made to the caps on basic pay, which resulted in the establishment of caps at levels II and III of the Executive Schedule, the elimination of locality pay might be viewed as a practical matter. However, senior executives employed by an agency whose performance appraisal system is not certified could be adversely affected by the loss of locality pay.

Total Compensation. The performance appraisal certification process was established by another statute, the Homeland Security Act of 2002 (P.L. 107-296; 116 Stat. 2135, at 2297), which also shifted the cap on total compensation. For senior executives subject to a performance appraisal system that has not been certified by OPM, the cap on total compensation remains EX-I (\$180,100 in 2005). For individuals subject to a certified appraisal system, the cap has shifted upward to the Vice President's salary, which is \$208,100 in 2005. The significance of this change has to do with timing. For senior executives with certified appraisal systems, they are more likely to receive all of their compensation in one year instead of having some payments deferred to the following year (which is what occurs when an individual's total compensation exceeds the applicable cap).

Under Section 1125(c), the amendments made by this section took effect on the first date of the first pay period that began on or after January 1, 2004 (which was January 11 for most senior executives).⁶⁴ Section 1125(c) also ensures that a senior executive's basic rate of pay will not be reduced, as a result of changes effected by Section 1125(a), during the first year after enactment. For the purpose of ensuring that an individual's rate of basic pay is not reduced, a senior executive's rate of basic pay will equal the rate of basic pay and the locality pay he or she was being paid on the date of enactment of this legislation. Section 1125(c) noted that any reference in law to a rate of basic pay above the minimum level and below the maximum level payable to senior executives will be considered a reference to the rate of pay for Executive Schedule level IV.⁶⁵

Post-Employment Restrictions⁶⁶

Section 1125(b) applies the post-employment conflict of interest provision commonly known as the one-year "cooling off" period (18 U.S.C. §207(c)(1)) to (in addition to those paid on the Executive Schedule) those not paid on the Executive Schedule but who are compensated at a rate of pay equal to, or greater than, 86.5% of the rate of basic pay for level II of the Executive Schedule (\$162,100 in 2005, so

⁶⁴ Sec. 1125(b) addresses post-employment restrictions generally, and is addressed in another section of this report.

⁶⁵ See U.S. Office of Personnel Management, Memorandum For Heads of Departments and Agencies, "New Performance-Based Pay System for the Senior Executive Service," Dec. 16, 2003; U.S. Office of Personnel Management, Memorandum For Heads of Executive Departments and Agencies, "Conversion to New SES Performance-Based Pay System," Jan. 9, 2004; and U.S. Office of Personnel Management, "Senior Executive Service Pay and Performance Awards," *Federal Register*, vol. 69, Jan. 13, 2004, pp. 2048-2052.

⁶⁶ 117 Stat. 1639-1640.

\$140,217), or, for two years after the enactment of this act, those persons who would have been covered by the restriction the day before the act was passed (those compensated at a base rate of pay equal to or greater than a level 5 for the SES). The provision amends 18 U.S.C. §207(c)(2)(A)(ii).⁶⁷ The post-employment restrictions, according to OPM,

require that for one year after service in a covered position ends, no former employee may knowingly make, with the intent to influence, any communication to or appearance before an employee of a department or agency in which he or she served in any capacity during the one-year period prior to ending service in that position, if that communication or appearance is made on behalf of any other person (except the United States) in connection with any matter concerning which he or she seeks official action by that employee. Employees ... also are subject to 18 U.S.C. §207(f), which imposes additional restrictions on representing, aiding, or advising certain foreign entities with the intent to influence any officer or employee of any department or agency of the United States.⁶⁸

Implementation. OPM published interim regulations to implement the provision in the *Federal Register* on October 15, 2004.⁶⁹ The regulations became effective on the first day of the first applicable pay period beginning on or after October 15, 2004. According to OPM, with the January 2004 implementation of the new Senior Executive Service (SES) performance-based pay system “the vast majority of SES members are now subject to the post-employment restrictions.”⁷⁰

Design Elements of Pay-for-Performance Systems in Demonstration Projects⁷¹

Section 1126 amends 5 U.S.C. Chapter 47 which covers the conduct of personnel research programs and demonstration projects. The provision specifies certain elements that must be present in a demonstration project’s pay-for-performance system. The eight elements are:

- adherence to merit system principles under 5 U.S.C. §2301;
- a fair, credible, and transparent employee performance appraisal system;
- a link between elements of the pay-for-performance system, the employee performance appraisal system, and the agency’s strategic plan;

⁶⁷ See U.S. Office of Personnel Management, Memorandum For Heads of Executive Departments and Agencies, “Notification of Changes in Post-Employment Restrictions Coverage for Members of the Senior Executive Service (SES),” Jan. 6, 2004.

⁶⁸ U.S. Office of Personnel Management, “Notification of Post-Employment Restrictions,” *Federal Register*, Oct. 15, 2004, vol. 69, no. 199, p. 61143.

⁶⁹ *Ibid.*, pp. 61143-61144.

⁷⁰ *Ibid.*, p. 61143.

⁷¹ 117 Stat. 1640.

- a means for ensuring employee involvement in the design and implementation of the system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay-for-performance system;
- a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the pay-for-performance system.

These eight elements address longstanding concerns expressed by employees, their unions, and representatives about the pay-for-performance component of demonstration projects.

Implementation. In its semiannual regulatory agenda published in the *Federal Register* on December 13, 2004, OPM states that it will issue “proposed regulations to position agencies to operate pay-for-performance by having in place performance appraisal systems for covered employees that are capable of making performance distinctions to support these pay systems.”⁷² The agenda anticipates final action by June 2005.

Federal Flexible Benefits Plan Administrative Costs⁷³

Section 1127 prohibits federal agencies that offer flexible spending accounts (FSAs) from imposing fees on employees to defray their administrative costs. It also requires agencies to forward to OPM (or an entity it designates) amounts to offset these costs. OPM is required to submit to the House Committee on Government Reform and the Senate Committee on Governmental Affairs, no later than March 31, 2004, reports on the administrative costs associated with the government-wide FSA program for FY2003 and the projected administrative costs for each of the five fiscal years thereafter. At the end of each of the first three calendar years in which an agency offers FSAs, the agency will be required to submit a report to the Office of Management and Budget (OMB) on the employment tax savings from the accounts (i.e., the Social Security and Medicare taxes they otherwise would have had to pay), net of administrative fees paid.

Employees in most federal agencies were given an FSA option starting in July 2003. The new benefit allows employees to put pretax money aside for unreimbursed health care or dependent care expenses in exchange for receiving lower pay. (Section 5525 of Title 5 provides that agency heads may establish procedures under which employees are permitted to make allotments and assignments out of their pay for

⁷² U.S. Office of Personnel Management, “Semiannual Regulatory Agenda,” *Federal Register*, Dec. 13, 2004, vol. 69, no. 238, p. 74010.

⁷³ 117 Stat. 1640-1641.

such purposes as the agency head considers appropriate.) For example, employees might elect to reduce their pay by \$50 each pay period in exchange for having \$1,300 (i.e., \$50 x 26 pay periods in a year) placed in their health care FSA. When they incur unreimbursed health care expenses (e.g., copayments and deductibles, or dental expenditures not covered by insurance) they would be reimbursed from their account. FSA reimbursements are exempt from federal income and employment taxes as well as state income taxes; thus, employees electing to participate can save on taxes they otherwise would have incurred had they instead used take-home pay for the expenses. Information about the federal FSAs can be found at [<https://www.fsafeds.com/fsafeds/index.asp>].

FSAs involve administrative costs, particularly for determining the eligibility of submitted claims. OPM, which has contracted with SHPS, Inc., to administer the FSAs, originally intended to have participating employees pay \$4 a month for their health care FSA and 1.5% annually of the amount set aside for their dependent care FSA. Shortly before the program started, OPM gave agencies the option of absorbing administrative expenses themselves, and most have done so. P.L. 108-136 requires participating agencies to pay the administrative costs and prohibits the government from charging fees to employees.

One argument for having employees pay FSA administrative costs is that they are the principal beneficiaries; if the government were to pay, the cost might be partially borne by employees without FSAs or by other programs or even taxpayers generally. However, imposing fees on employees could discourage participation. Few private sector or other employers impose FSA fees on participants; most pay for the administrative costs out of their employment tax savings.

Implementation. As directed in P.L. 108-136, OPM reported to Congress in April 2004 on “the cost of administrative fees agencies will pay to cover employees enrolled in a flexible spending account.” The report showed that 117,950 employees opened a health-care FSA and 18,178 employees opened a dependent-care FSA in 2004. OPM projected that more than 283,000 employees would have health-care FSAs and 43,627 would have dependent-care FSAs by 2007. A January 2005 news release by OPM reported that 157,000 employees are participating in the FSA program for 2005.⁷⁴ In the April 2004 report, administrative fees were projected to be \$5.6 million for health-care FSAs and \$980,000 for dependent-care FSAs in 2004 and were expected to total nearly \$80 million for health-care FSAs, dependent-care FSAs, or both through 2007. According to OPM: “Employees benefit because untaxed contributions from their salaries are deposited into their FSA accounts, and the lower employee taxable income translates into agencies paying out less in Social Security and Medicare taxes ... because agencies pay less in taxes, they more than recover the cost of paying FSA administrative fees.”⁷⁵

⁷⁴ U.S. Office of Personnel Management, “Enrollment in Flexible Spending Account Program Increases by 25 Percent,” Jan. 10, 2005. Available on the Internet at [<http://www.opm.gov>], visited Jan. 11, 2005.

⁷⁵ U.S. Office of Personnel Management, “OPM Reports to Congress on Agency Payments of Flexible Spending Account Fees,” Apr. 23, 2004. Available on the Internet at (continued...)

Employee Surveys⁷⁶

Section 1128 mandates annual surveys of employees by federal executive departments, government corporations, and independent establishments. OPM will issue regulations prescribing survey questions that will appear on all agency surveys so as to allow a comparison of results across agencies. Questions unique to an agency also may be included on the survey. The surveys will address leadership and management practices that contribute to agency performance. Employee satisfaction with leadership policies and practices, work environment, rewards and recognition for professional accomplishment and personal contributions to achieving organizational mission, opportunity for professional development and growth, and opportunity to contribute to achieving organizational mission also will be surveyed. Agency results will be available to the public. They also will be posted on the respective agency's website unless the agency head determines that doing so would jeopardize or negatively affect national security.

From time to time, OPM has conducted surveys of federal employees, but the surveys authorized by this provision would be conducted by agencies and particularly focus on their leadership and performance and employee contribution to agency mission. The provision does not mandate any remedial actions that an agency might want to take once the survey results are known. As to not posting survey results for reasons of national security, the term "national security" is not defined. OPM could address this issue in its regulations to implement the program which are anticipated in 2004.

Implementation. OPM's semiannual regulatory agenda published in the *Federal Register* on December 13, 2004, indicates that the regulations on employee surveys were withdrawn as an agenda item on November 5, 2004.⁷⁷ No further information was provided.

Human Capital Performance Fund⁷⁸

Section 1129 amends Part III, Subpart D of Title 5 *United States Code* by adding a new Chapter 54 entitled Human Capital Performance Fund. The legislation states that the purpose of the provision is to promote greater performance in the federal government. According to the law, the fund will reward the highest performing and most valuable employees in an agency and offer federal managers a new tool for recognizing employee performance that is critical to an agency achieving its mission.

⁷⁵ (...continued)

[<http://www.opm.gov>], visited Apr. 27, 2004. See also, Stephen Barr, "Agencies, Workers Benefit From Availability of Flexible Spending Accounts," *The Washington Post*, Apr. 27, 2004, p. B2.

⁷⁶ 117 Stat. 1641.

⁷⁷ U.S. Office of Personnel Management, "Semiannual Regulatory Agenda," *Federal Register*, Dec. 13, 2004, vol. 69, no. 238, p. 74030.

⁷⁸ 117 Stat. 1641-1645.

Organizations eligible for consideration to participate in the fund are executive departments, government corporations, and independent agencies. The General Accounting Office is not covered by the chapter. The fund may be used to reward General Schedule, Foreign Service, and Veterans Health Administration employees; prevailing rate employees; and employees included by OPM following review of plans submitted by agencies seeking to participate in the fund. Executive Schedule (or comparable rate) employees; SES members; administrative law judges; contract appeals board members; administrative appeals judges; and individuals in positions which are excepted from the competitive service because of their confidential, policy-determining, policy-making, or policy-advocating character are not eligible to receive payments from the fund.

OPM will administer the fund which is authorized a \$500,000,000 appropriation for FY2004.⁷⁹ Such sums as may be necessary to carry out the provision are authorized for each subsequent fiscal year. In the first year of implementation, up to 10% of any appropriation will be available to participating agencies to train supervisors, managers, and other individuals involved in the appraisal process on using performance management systems to make meaningful distinctions in employee performance and on using the fund.

Agencies seeking to participate in the fund will submit plans to OPM for approval. The plans must incorporate the following elements:

- adherence to merit principles under 5 U.S.C. §2301;
- a fair, credible, and transparent performance appraisal system;
- a link between the pay-for-performance system, the employee performance appraisal system, and the agency's strategic plan;
- a means for ensuring employee involvement in the design and implementation of the system;
- adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the pay-for-performance system;
- a process for ensuring ongoing performance feedback and dialogue between supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;
- effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance; and
- a means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the pay-for-performance system.

⁷⁹ P.L. 108-199, the Consolidated Appropriations Act for FY2004, enacted on January 23, 2004 (118 Stat. 339) provides an appropriation of \$1 million for the Human Capital Performance Fund. Obligation or transfer of the funding was contingent upon the enactment of the legislation to establish the fund within OPM. Funds shall not be obligated or transferred to any federal agency until the OPM director notifies and receives prior approval from the relevant subcommittees of jurisdiction of the Committees on Appropriations of OPM approval of an agency's performance pay plan. Such amounts as determined by the OPM Director may be transferred to federal agencies to carry out the purposes of the fund.

An agency will receive an allocation of monies from the fund once OPM, in consultation with the Chief Human Capital Officers Council, reviews and approves its plan.⁸⁰ After the reduction for training (discussed above), 90% of the remaining amount of any appropriation to the fund may be allocated to the agencies. An agency's prorated distribution may not exceed its prorated share of executive branch payroll. (Agencies will provide OPM with necessary payroll information.) If OPM were not to allocate an agency's full prorated share, the remaining amount will be available for distribution to other agencies.

After the reduction for training, 10% of the remaining amount of any appropriation to the fund as well as the amount of an agency's prorated share not distributed because of the agency's failure to submit a satisfactory plan, will be allocated among agencies with exceptionally high-quality plans. Such agencies will be eligible to receive a distribution in addition to their full prorated distribution.

Agencies, in accordance with their approved plans, may make human capital performance payments to employees based on exceptional performance contributing to the achievement of the agency mission. In any year, the number of employees in an agency receiving payments may not be more than the number equal to 15% of the agency's average total civilian full-time and part-time permanent employment for the previous fiscal year. A payment may not exceed 10% of the employee's basic pay rate. The employee's aggregate pay (basic, locality pay, human capital performance pay) may not exceed Executive Level IV (\$140,300 in 2005).

A human capital performance payment will be in addition to annual pay adjustments and locality-based comparability payments. Such payments will be considered basic pay for purposes of Civil Service Retirement System, Federal Employees' Retirement System, life insurance, and for such other purposes (other than adverse actions) which OPM determines by regulation. Information on payments made and the use of monies from the fund will be provided by the agencies to OPM as specified.

Initially, agencies will use monies from the fund to make the human capital performance payments. In subsequent years, continued financing of previously awarded payments will be derived from other agency funds available for salaries and expenses. Under current law (5 U.S.C. §5335) agencies pay periodic within-grade increases to employees performing at an acceptable level of competence. Presumably, funds for such within-grade increases could be used to pay human capital performance payments. Monies from the fund may not be used for new positions, for other performance-related payments, or for recruitment or retention incentives.

OPM will issue regulations to implement the new Chapter 54 provisions. Those regulations must include criteria governing:

- an agency's plan;

⁸⁰ The Chief Human Capital Officers Council would include an evaluation of the formulation and implementation of agency performance management systems in its annual report to Congress.

- allocation of monies from the fund to the agencies;
- the nature, extent, duration, and adjustment of, and approval processes for, payments to employees;
- the relationship of agency performance management systems to the Human Capital Performance Fund;
- training of supervisors, managers, and other individuals involved in the process of making performance distinctions; and
- the circumstances under which funds could be allocated by OPM to an agency in amounts below or in excess of the agency's pro rated share.

The Human Capital Performance Fund was proposed by President George Bush in his FY2004 budget. According to the budget, the fund "is designed to create performance-driven pay systems for employees and reinforce the value of employee performance management systems."⁸¹ The effectiveness of agency performance management systems and whether the performance ratings would be determined according to preconceived ideas of how the ratings would be arrayed across the particular rating categories are among the concerns expressed by federal employees and their unions and representatives. Other concerns are that the fund could take monies away from the already reduced locality-based comparability payments and that the performance award amounts would be so small as to not serve as an incentive.

Implementation. OPM's semiannual regulatory agenda published in the *Federal Register* on December 13, 2004, indicates that the agency plans to issue an interim final rule implementing the Human Capital Performance Fund, but also indicates that the timetable for publishing the rule is yet to be determined.⁸² The Consolidated Appropriations Act for FY2005, P.L. 108-447, does not provide an appropriation for the fund.

Other Personnel Provisions

Contracting For Personal Services⁸³

Title VIII, Subtitle D, Section 841, of P.L. 108-136 amends 10 U.S.C. §129(b) by adding a new subsection that authorizes the Secretary to enter into personal services contracts if the personal services (A) are to be provided by individuals outside the United States, regardless of their nationality, and are determined by the Secretary to be necessary and appropriate for supporting the activities and programs of DOD outside the United States; (B) directly support the mission of a defense intelligence component or counterintelligence organization of DOD; or (C) directly

⁸¹ U.S. Executive Office of the President, Office of Management and Budget, *Budget of the United States Government Fiscal Year 2004 Appendix* (Washington: GPO, 2003, p. 973).

⁸² U.S. Office of Personnel Management, "Semiannual Regulatory Agenda," *Federal Register*, Dec. 13, 2004, vol. 69, no. 238, p. 74028.

⁸³ 117 Stat. 1552.

support the mission of the special operations command of DOD. The contracting officer for a personal services contract under this subsection is responsible for insuring that (A) the services to be procured are urgent or unique; and (B) it would be impracticable for DOD to obtain such services by other means. The requirements of 5 U.S.C. 3109 will not apply to a contract entered into under this subsection.

Transfer of Personnel Investigative Functions and Related Personnel of the Department of Defense⁸⁴

Title IX, Section 906, of P.L. 108-136 authorizes the transfer of the personnel security investigations functions and associated personnel from the Department of Defense Security Service (DSS) to the Office of Personnel Management (OPM).⁸⁵ The process is currently underway and could be affected by the subsequent Intelligence Reform and Terrorism Prevention Act of 2004 (Title III, P.L. 108-458), which also provides for changes in the personnel security system.

The functional transfer was made contingent on acceptance by both the Secretary of Defense and the OPM Director. If so agreed, the transfer of DSS investigative personnel is mandatory, while the transfer of support personnel is at the discretion of the Secretary and the Director. When the transfer is made, the Director, in coordination with the Secretary, is to review all functions performed at the time of the transfer by DSS and make a “written determination regarding whether each such function is inherently governmental or is otherwise inappropriate for performance by contractor personnel.” Such functions may not be contracted to private contractors unless and until the Director makes a written determination that these are *not* inherently governmental or otherwise *not* inappropriate for contractor performance. If so decided, the contracting will be governed by the requirements of OMB Circular A-76. On November 22, 2004, the department and office announced the transfer of the function, along with 1,850 staff from DSS to OPM. On February 15, 2005, OPM announced the selection of 12 managers for key leadership positions in the personnel security investigations program. According to OPM, “Beginning February 20, the transfer [of DSS’ personnel security investigations program to OPM] will establish OPM as the single source for federal national security background and suitability investigative services for more than 90 percent of the federal government.”⁸⁶

The Intelligence Reform Act added several new requirements to the clearance process. Designed to expedite, simplify, and standardize it, the law calls upon the President to designate a single executive branch agency to be responsible for security clearance investigations and directs the head of OPM to establish and operate an integrated, secure database on security clearances.

⁸⁴ 117 Stat. 1561-1563.

⁸⁵ This provision was Section 1104 in H.R. 1588, as passed by the House.

⁸⁶ U.S. Office of Personnel Management, “OPM Announces Selections of Investigations Management Team,” News Release, Feb. 15. 2005. Available on the Internet at [<http://www.opm.gov>], visited Feb. 16, 2005.

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